

87-1200 ①

No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

BOARD OF TRUSTEES OF ALABAMA STATE UNIVERSITY;
BOARD OF TRUSTEES OF ALABAMA A & M UNIVERSITY;
JOHN KNIGHT, et al.; and
NORMALITE ASSOCIATION, et al.,
Petitioners,

v.

AUBURN UNIVERSITY; et al.,
Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
ELEVENTH CIRCUIT**

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QUESTIONS PRESENTED

The court of appeals held that the district judge should have been disqualified under 28 U.S.C. § 455, on the basis of two grounds which were raised for the first time on appeal and a third ground which had been raised and rejected in the district court. The following questions are presented:

1. Whether a school desegregation defendant whose pretrial attempt to disqualify the black district judge on the basis of his race was denied should be allowed to assert new grounds for recusal for the first time in the court of appeals based on the public record of the judge as a state legislator, which was known to the defendant before the trial began, in order to set aside four years of litigation and a ruling that the defendant was perpetuating vestiges of de jure segregation.

2. Whether a court of appeals may order a district judge recused under 28 U.S.C. § 455 based on grounds which were never presented to the district court, and based on documents—such as a newspaper clipping—which were not in the record and never made the subject of a factual inquiry by any court.

3. Whether, as to the one ground for recusal which had been presented to the district court and rejected by it, the court of appeals could reverse without finding an abuse of discretion or plain error, or, for that matter, without referring to the district court's findings at all.

4. Whether, assuming the grounds were timely raised, a judge's prior involvement with public issues as a civil rights lawyer and state legislator necessarily furnishes him with "personal knowledge of disputed

evidentiary facts," so as to require recusal under 28 U.S.C. § 455.

Two of the petitioners, Board of Trustees of Alabama State University and Board of Trustees of Alabama A & M University, also present the following question:

5. Whether the court below correctly held that a state university and its board members have no standing to seek relief from governmental acts which discriminate on account of race and which prevent the university and its board members from meeting their constitutional duty to avoid discrimination.¹

¹ Petitioners present the following additional question conditionally, to be considered only if this Court grants certiorari to review the judgment below based on any of the foregoing five questions:

6. Whether the order of the district court, which decided liability but not remedy in this school desegregation case, was an appealable order.

**ADDITIONAL PARTIES IN THIS COURT AND
PARTIES IN THE COURT BELOW**

The petitioners in this Court are shown in the caption.² The respondents, in addition to Auburn University and its Board of Trustees, are Troy State University and the members of its Board of Trustees, the Board of Trustees of the University of Alabama, the State of Alabama, the Governor of the State of Alabama, the Alabama State Board of Education, the State Superintendent of Education, and the Alabama Public School and College Authority.

In the court below, the petitioners here were all appellees, while the respondents here were all appellants.

The only additional party in the court below was the United States, which was an appellee.

There were several additional parties in the district court which were not parties to the appeal in the court below and are therefore not understood to be parties in this Court.

² Two of the petitioners are groups who intervened as plaintiffs in the district court, and who are identified in this caption by the name of the first member of the group. The John Knight group of intervenors also includes Catherine Coleman, Charles R. Anderson, Alma S. Freeman, John T. Gibson, Susan Buskey, Carl Petty, Tamara L. Knight, and Dennis C. Barnett. The Normalite Association group of intervenors also includes the University Legal Defense Fund.

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CITATIONS TO OPINIONS BELOW

The decision of the Court of Appeals is reported at 828 F.2d 1532 (11th Cir. 1987), and is reprinted in this Petition at App. 1a. The district court decision denying the motion to recuse is reported at 582 F. Supp. 1197 (N.D.Ala. 1984) (Senior Circuit Judge David W. Dyer), and is reprinted at App. 41a.

The district court's decision on the merits (which does not deal with recusal but does deal with whether several of the petitioners have standing to raise 14th amendment claims) is reported at 628 F. Supp. 1137

(N.D. Ala. 1985) (Clemon, J.), and is reprinted at App. 62a. In deciding the issue of standing to sue, the decision below referred to an earlier court of appeals decision in this case, which is reported at 791 F.2d 1450 (11th Cir. 1986), cert. denied, 94 L.Ed.2d 144 (1987), and is reprinted at App. 139a.

The Appendix materials are reprinted in a separate volume filed with this Petition.

JURISDICTION

The judgment of the Court of Appeals was entered on October 6, 1987. On December 29, 1987, Justice Stevens extended the time for filing this petition to January 19, 1988. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The statute involved in this case, 28 U.S.C. § 455, is reprinted at App. 160a. The constitutional provisions involved in this case, the Supremacy Clause and the Equal Protection Clause, are reprinted at App. 158a.

STATEMENT OF THE CASE

This petition arises from attempts by two of the respondents (Auburn University and the State Superintendent of Education) to remove a black district judge from a suit to desegregate the public colleges and universities of Alabama. After failing in their efforts to remove the judge before trial, and after a month-long trial had resulted in a ruling finding significant vestiges of *de jure* segregation in Alabama's

system of higher education, one of the respondents, Auburn University, raised two new grounds for recusal in the court of appeals. The court of appeals ruled on the two new grounds, held that the district judge must be recused under 28 U.S.C. § 455, vacated his finding of liability, and ordered a new trial. The court of appeals also held that petitioners Board of Trustees of Alabama State University and Board of Trustees of Alabama A & M University lacked standing to be plaintiffs.

The case overall has a long procedural history, but the facts relating to these issues are relatively uncomplicated. In 1983 the United States filed this suit to eliminate the vestiges of *de jure* segregation in the public colleges and universities of Alabama. The defendants were the State of Alabama, various state education agencies and officials, seven traditionally white universities, and two traditionally black universities (Alabama State University and Alabama A & M University).

The case was assigned randomly to U.S. District Judge U.W. Clemon, sitting in Birmingham. Judge Clemon is black.

Petitioners Alabama State University and Alabama A & M University, conceding the allegations of the United States and recognizing their constitutional obligation to avoid racial discrimination, moved successfully to be realigned as party plaintiffs rather than defendants. In addition, two groups of private citizens (the Knight intervenors and the Normalite intervenors) also intervened as plaintiffs.³

³ The Normalites' intervention was limited to participation in the remedy phase of the case.

On September 6, 1983, respondent Auburn University filed a motion to disqualify Judge Clemon. The State Superintendent of Education joined in the motion. After a hearing, Judge Clemon denied the motions. Auburn petitioned the 11th Circuit for a writ of mandamus, which was granted, in part, to the extent of directing that the motions to recuse be heard by another judge.⁴ The motions were ultimately assigned to Senior Circuit Judge David W. Dyer.

One of the alleged grounds for recusal was that Judge Clemon had minor children who might be members of a class affected by the outcome of the litigation; some of the other grounds related to Judge Clemon's participation in several prior civil rights cases. There were no allegations that anything in Judge Clemon's legislative record warranted recusal. Neither the State of Alabama, the Governor, nor any of the six other defendant universities joined the motion for recusal.

Following a hearing, Judge Dyer denied the motions to recuse in an exhaustive order analyzing each argument raised first under 28 U.S.C. § 144 and then under § 455. He found that the allegations raised no suggestion of bias or the appearance of bias; instead, as Judge Dyer found, they appeared to raise only the

The defendants named in the United States complaint were the actual institutions or agencies. In order to avoid 11th amendment problems, the new plaintiffs named as additional defendants the Board members of some of the institutional defendants, sued in their official capacities.

⁴ On remand the motions to recuse were initially assigned to Hon. H. H. Grooms, who first granted the motions and then vacated his order and recused himself. App. 12a, 60a.

suggestion that a black judge cannot fairly hear or decide a civil rights case:

"The question underlying the allegations in the present affidavits is whether a black judge should be disqualified *per se* from adjudicating cases involving claims of racial discrimination." App. 49a.

Judge Dyer held that allegations of this sort are not grounds for recusing a judge:

"A claim that is essentially an allegation based on the judge's background and which states no specific facts that would suggest he would be anything but impartial in deciding the case before him is insufficient." App. 48a.

One of the grounds that Judge Dyer dealt with in detail was the claim that Judge Clemon's participation in the case of *Lee v. Macon County Bd. of Education* should disqualify him because it gave him access to disputed evidentiary facts relevant to the present case. As Judge Dyer recognized, *Lee v. Macon* was an omnibus school desegregation case which had been split into more than 100 separate actions before Judge Clemon became involved in two small parts (involving elementary and secondary schools in Sumter County and Anniston) that had nothing to do with higher education. App. 54a. Judge Dyer found as a fact that Judge Clemon's involvement in *Lee v. Macon* was not the same "matter in controversy" under § 455(b)(2), and that Judge Clemon did not have access to "disputed evidentiary facts" under § 455(b)(1). App. 55a.

Auburn moved to reconsider Judge Dyer's decision or, in the alternative, to certify it for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Judge Dyer denied this motion on March 28, 1984. Auburn did

not petition again for a writ of mandamus or take any other steps on the recusal issue at that time.

The case returned to Judge Clemon. There followed fifteen months of extensive discovery and pretrial proceedings until the trial began on July 1, 1985. It ended on August 2, 22 trial days and 8043 transcript pages later.

The district court entered its findings on liability on December 9, 1985, finding that in many respects there were still vestiges of the dual system of higher education. In other respects, the district court found no liability. The district court scheduled the beginning of remedial proceedings and directed the State and its higher education commission to submit specific desegregation plans. App. 137a.

The principal respondents moved to certify the December 9 order for interlocutory appeal, which the district court denied. They nonetheless filed notices of appeal, asserting this time that the December 9 order was in fact appealable.

On appeal, Auburn advanced two new grounds for recusal, based in each case on a document that was not in the record. The first new ground was that as a State Senator in 1977, Judge Clemon had opposed the appointment of Thomas Radney, who is white, to the Alabama State University Board of Trustees. This new ground for recusal was based on a 1977 newspaper clipping which Auburn boldly attached to its 25-page notice of appeal, and which it thereafter included as an "attachment" to its appellate brief. The clipping was not in the record, petitioners repeatedly objected to its use, and Auburn never explained how it could seek to rely on it. The second new ground

was that as a State Senator in 1978, Judge Clemon had been one of seven co-sponsors of a bill (which did not pass) to appropriate \$10,000,000 for capital improvements at Alabama A & M University. This ground was likewise based on a document that was not in the record—a page of the 1978 Alabama Senate Journal—but was also an “attachment” to Auburn’s brief in the court of appeals.

No record was ever made about when Auburn had obtained these documents, or how it justified sitting on these grounds for more than a year until the very point when the notice of appeal was filed and the case left the district court’s jurisdiction. Auburn’s brief stated that it had obtained the newspaper clipping in June 1984, and had obtained the other document “after” Judge Clemon’s December 9, 1985 order.⁵ Whether either of these statements was correct was never determined.

The court of appeals stayed all proceedings pending appeal. After briefing and argument, the court of appeals issued its decision on October 6, 1987.

The court of appeals decision. The heart of the court of appeals decision dealt with the recusal issue.⁶ The

⁵ Auburn conceded that it had known of the proposed appropriations bill several months before the trial, and a year and a half before advancing it as a ground for recusal; its claim was simply that it was unaware until “after” December 9, 1985 (how long “after” it did not say), that Senator Clemon was one of the sponsors.

⁶ The court of appeals decided a number of other issues. It held the liability finding of December 9, 1985, was an appealable order, a holding which petitioners seek to review only if this Court grants certiorari as to the recusal or standing issues. The

court first rejected all but one of the arguments advanced by respondent in the district court, and held that Judge Clemon's background as a civil rights lawyer did not disqualify him. The court of appeals went on, however, to address on the merits the two new arguments first raised on appeal, and here the court of appeals made original findings of fact on the basis of which it held the district judge must be disqualified.

The court of appeals did not hold that Judge Clemon had a "personal bias or prejudice concerning a party." within the meaning of 28 U.S.C. § 455(b)(1), or that he had an interest or other disqualifying connection within the meaning of § 455(b)(2)-(5), but held instead that Auburn's new documents proved Judge Clemon had had "personal knowledge of disputed evidentiary facts concerning the proceeding," and must therefore be disqualified. App. 27a-28a.

The first finding on which this holding rested was that as a State Senator, "Judge Clemon shaped the composition of these governing boards by acting along with other members of his committee to prevent nominations from reaching the Senate floor." The basis for this finding of the court of appeals was apparently the extra-record newspaper clipping, about which the court said: "For example, press accounts indicate that Judge Clemon was instrumental in preventing the confirmation of Thomas Radney to the Board of Trustees of ASU and that Judge Clemon opposed the

court of appeals held that the claims under Title VI of the Civil Rights Act of 1964 could not stand without program-specific pleading and proof, and it held that the United States could not sue under the fourteenth amendment. The court also held that the university petitioners lacked standing, an issue which is discussed further below.

nomination on the explicit grounds that Radney's confirmation would have created a white majority on the ASU board." App. 24a. There was no record to support these press accounts, but the court of appeals made a finding that Judge Clemon "actively participated in the very events and shaped the very facts that are at issue in this suit."

Turning to the A & M appropriation bill, the court of appeals found that Judge Clemon was a co-sponsor of the bill, a finding which was apparently based on the Senate Journal page which was not in the record. App. 25a. The court of appeals proceeded from there, however, to make a finding of fact that "the stated premise of this bill was that the facilities of A & M were inferior to those of the historically white universities." This finding is not only not supported by any record, but is flatly contradicted by the record, by the description of the bill contained in Auburn's extra-record Senate Journal page ("S. 387. To appropriate from the Special Educational Trust Fund the sum of \$10,000,000.00 for the fiscal year ending September 30, 1979, to finance certain capital improvements at Alabama Agricultural and Mechanical University in Huntsville, Alabama."), and by the text of the bill itself. *See* S. 387, Jan. 17, 1978 (Alabama Dept. of Archives and History). Finally, the court of appeals made findings that Judge Clemon helped "spearhead" the bill, and that its failure was "despite then-Senator Clemon's best efforts to gain passage of the bill." The source of these findings is likewise a complete mystery since they do not appear to have any basis in the record or in the extra-record document.

The court of appeals then turned to Judge Clemon's involvement in the *Lee v. Macon* case. Without mentioning Judge Dyer's ruling to the contrary, the court of appeals proceeded to substitute its own finding that Judge Clemon *did* have extrajudicial knowledge of disputed facts from *Lee v. Macon* that "concern[ed] the proceeding," i.e., this higher education case. App. 26a-28a. This finding was based on the introduction in the month-long trial of a single exhibit, out of thousands, showing undisputed facts concerning decreases in the number of black high school principals during a number of years. The specific document to which the court of appeals referred was a published report entitled "The Slow Death of the Black Educator in Alabama," which had been cited by the Fifth Circuit in 1971 in a *Lee v. Macon*-captioned case involving the Muscle Shoals School District (in which Judge Clemon had not been involved). *Lee v. Macon County Bd of Education (Muscle Shoals)*. 453 F.2d 1104, 1110 (5th Cir. 1971). The court of appeals apparently reasoned that the failure to exclude this exhibit as irrelevant in the trial of this higher education case showed that all the *Lee v. Macon* cases dealing with elementary and secondary education must be the same case as this higher education case.

The court of appeals did not address the fact that the two principal grounds for recusal had not been presented to the district court at any time,⁷ and were

⁷ The court of appeals characterized petitioners' argument as objecting to the new grounds because "they were not presented to Judge Dyer," App. 24a-25a, at n. 49, but as each of the petitioners' appellate briefs made clear, the objection was to Auburn's silence during the 22 months that the case remained in the district court *following* Judge Dyer's decision.

not based on any record. The court of appeals treated the unorthodox procedures as simply raising a question of the timeliness of Auburn's arguments, and its resolution of that question also rested on findings of fact made without support.

First suggesting that there might be no timeliness requirement at all, the court of appeals then held that it would be inappropriate to apply a timeliness requirement "under the circumstances of this case." App. 24a-25a, at n.49. In so holding the court noted that those courts adopting a timeliness requirement have done so to prevent litigants from abusing motions to disqualify as dilatory tactics, and it then made a finding of fact that "appellants here were not acting to delay or to speculate on a favorable substantive judgment in the interim." This finding was based on the following critical subsidiary finding:

"Appellants did not discover relevant information about Judge Clemon's activities as a legislator until late in the litigation and raised this ground for disqualification at the first available moment." App. 24a-25a, at n.49.

There is no record or extra-record basis for this finding of fact. Indeed it is contradicted by Auburn itself, which said in its court of appeals brief that it obtained the newspaper clipping in mid-1984, a year before trial.

Having found that Judge Clemon should be disqualified, the court of appeals went on to order a new trial. App. 29a.

Standing of petitioners Alabama State University and Alabama A & M University. The opinion below also held that the two state institutions and their

boards of trustees lacked standing to assert fourteenth amendment claims. In doing so, the court of appeals did not detail its reasons anew, but referred to its earlier decision in this litigation where those reasons were spelled out. App. 5a, at n.1. That earlier decision was an appeal from a preliminary injunction obtained by petitioners Alabama State University and the Knight intervenors shortly after the trial but before the order of December 9, 1985.

In that earlier appeal, the court of appeals upheld the injunction insofar as it had been requested by the Knight intervenors, but reversed it as to Alabama State University on the ground that Alabama State University lacked standing. App. 139a.

In reaching its earlier decision, the Court of Appeals relied on a line of cases in this Court and in the former Fifth Circuit which, it said, "stands generally for the proposition that creatures of the state have no standing to invoke certain constitutional provisions in opposition to the will of their creator." App. 142a. The court of appeals did not address in either case the argument that the Boards of Trustees of Alabama State University or Alabama A & M University could raise claims either as representatives of their students and faculty, or in pursuance of the board members' obligation to carry out their own oaths of office to obey the Constitution as the Supreme Law of the Land. It cited none of the cases in other circuits which have explicitly held that a school board or school district may raise such claims, and it disposed in footnotes of this Court's controlling decisions in *Board of Education v. Allen*, 392 U.S. 236 (1968), and *Wash-*

ington v. Seattle School District No. 1, 458 U.S. 457 (1982). App. 144a, at n.2, and 146a, at n.5.

This petition followed.

REASONS FOR GRANTING THE WRIT

I. RECUSAL

The decision below takes a significant step in the wrong direction. By entertaining grounds for recusal which were raised for the first time in the court of appeals, based on extra-record documents, and without requiring a factual inquiry into either the allegations themselves or why they were held back from the district court, the lower court's decision conflicts with decisions in at least the Second, Fifth, Sixth, and Ninth Circuits, and opens the door for manipulation by litigants that threatens public confidence in the courts.

Moreover, the decision below threatens to create a dual standard by which a black judge has been recused for grounds not fairly distinguishable from those which have been held insufficient in motions to recuse white judges. Finally, the decision operates to reward a litigant whose claim seems to be that black judges cannot be fair in civil rights cases, while jettisoning four years of effort by the United States and black citizens to seek meaningful desegregation in higher education in Alabama.

This Court has recently granted certiorari and heard argument in a case where a motion to recuse was filed late in the proceeding. *Liljeberg v. Health Services Acquisition Corp.*, 796 F.2d 796 (5th Cir. 1986), cert. granted, No. 86-957 (O.T. 1987). The instant case raises many of the same concerns as are involved

there, with three important additions: here, unlike *Liljeberg*, (1) it appears that the party seeking recusal engaged in deliberate delay, (2) when the questions were raised, there was no remand for full development of a record in the district court so that a decision could be made, as it must be under § 455, based on facts, not conjecture, and (3) it appears that the judge's race motivated the motion to recuse.

1. The Procedures Allowed Here Reward Manipulation and Abuse of the Judicial Process.

Congress and the courts have wrestled with the need to administer judicial disqualification procedures in such a way as to maintain public confidence in the fairness of our judicial system. The adoption of the 1974 amendments to 28 U.S.C. § 455, which decreased the subjectivity of the process, was a major step in that direction. While judges no longer should assume a "duty to sit," however, it is equally important that judges not be removed for reasons that are speculative or, more critical, manipulative. Preventing litigants from manipulating the process is achieved largely by requiring orderly procedures, including a requirement that motions not be unduly delayed and a requirement, as to § 455 applications, that allegations be supported by a sufficient factual record. Those procedures have been applied in other circuits.

The decision below conflicts in a number of respects with the decisions of other circuits which have adopted procedural rules to prevent abuse of 28 U.S.C. § 455. In allowing a litigant to raise new grounds for recusal without time limit, the decision below is in conflict with decisions of the Second Circuit, *In re International Business Machines*, 618 F.2d 923, 932 (2d Cir.

1980), the Fifth Circuit, *Delesdernier v. Porterie*, 666 F.2d 116 (5th Cir.), *cert. denied*, 459 U.S. 839 (1982) and the Ninth Circuit, *United States v. Conforte*, 624 F.2d 869 (9th Cir.), *cert. denied*, 449 U.S. 1012 (1980). The Fifth Circuit explained why timeliness is so important:

"Lack of a timeliness requirement encourages speculation and converts the serious and laudatory business of insuring judicial fairness into a mere litigation strategem. Congress did not enact § 455(a) to allow counsel to make a game of the federal judiciary's ethical obligations; we should seek to preserve the integrity of the statute by discouraging bad faith manipulation of its rules for litigious advantage." 666 F.2d at 121.⁸

In deciding to entertain a newly raised ground for recusal (and make its own findings) without remanding to give the district court the first opportunity to rule and the critical opportunity to create a record, the decision below is in conflict with the Fifth Circuit, *Liljeberg v. Health Services Acquisition Corp.*, 796 F.2d 796 (5th Cir. 1986), the Sixth Circuit, *Price Bros. Co v. Philadelphia Gear Corp.*, 629 F.2d 444 (6th Cir. 1980), *cert. denied*, 454 U.S. 1099 (1981), and the Ninth Circuit, *United States v. Conforte*, 457 F. Supp. 641, 645 (N.D. Calif. 1978), *aff'd*, 624 F.2d 869 (9th Cir. 1980), *cert. denied*, 449 U.S. 1012 (1980). In *Conforte*, a case strikingly like the instant case, an ap-

⁸ The major exception to the insistence on timeliness is the Seventh Circuit, which recognizes that it "stands alone" and appears to be ready to reconsider. *United States v. Murphy*, 768 F.2d 1518, 1539 (7th Cir. 1985), *cert. denied*, 475 U.S. 1012 (1986).

pellant claimed that newly discovered evidence warranted recusal of the district judge and reversal of the judgment. Following a remand for an evidentiary hearing on both the timeliness and the sufficiency of the motion, the Ninth Circuit, in an opinion by Judge Kennedy, held a recusal ground untimely where the appellant had failed to move promptly in the district court after receiving knowledge which—even though incomplete—should have put him on notice of a possible ground for recusal. 624 F.2d at 879.

Finally, in deciding to grant retroactive relief of a new trial, especially where it appears the moving party has failed to move promptly, the decision below is in conflict with the Sixth Circuit, *Leaman v. Ohio Dept of Mental Retardation*, 825 F.2d 946, 948 (6th Cir. 1987), and the Seventh Circuit, *United States v. Murphy*, 768 F.2d 1518, 1539 (7th Cir. 1985), *cert. denied*, 475 U.S. 1012 (1986). But see *Liljeberg v. Health Services Acquisition Corp.*, *supra*.

The above list of procedural conflicts between the court below and other circuits is of course an incomplete description, since the lower court's basic error was resting a disqualification order on a litigant's assertions which were both out of order and untested, and supporting that disqualification order with crucial determinations which should more properly be called "surmises" than findings of fact, since they were so devoid of any record support. In this respect the lower court was obviously at variance with every other court which has dealt with Section 455.

In that posture, it is hardly surprising that the court of appeals repeatedly made findings of fact the source of which remains an utter mystery, as well as other findings of fact which are plainly erroneous.

The problems go well beyond the obvious mistake of relying on Auburn's fugitive newspaper clipping. Thus, for example, in the court of appeals' four sentences describing then-Senator Clemon's connection with the A & M appropriation bill, App. 25a, virtually every statement beyond the fact that he was one co-sponsor of a bill to appropriate \$10 million for Alabama A & M is either simply unsupported or is manifestly incorrect. The same plain error infects the court of appeals' statement that Auburn "did not discover" the relevant facts "until late in the litigation" and raised them "at the first available moment."

The procedural rules fashioned by the court of appeals have serious consequences far beyond this case. Just as motions for recusal can promote justice, they can be used to defeat it as well. In this case, while the absence of any record makes it difficult to discuss the facts, it was conceded in Auburn's brief (which is not part of the record) that the newspaper clipping about the Alabama State University Board member was in its hands by mid-1984, and remained there for eighteen months until the moment the case left the district court's jurisdiction. The conclusion is inescapable that Auburn, having been unsuccessful before two judges in the district court, deliberately withheld the document until it could try a new forum.

In this case, the court of appeals departed from the salutary rules followed by other circuits, proceeded without a record to find that Auburn's new grounds were timely⁹ and again without a record that

⁹ Petitioners also question (as we did in the court of appeals) whether it was timely to raise in the appeal even the grounds which had been presented to Judge Dyer. The Seventh Circuit's

they were sufficient to meet the standards of 28 U.S.C. § 455. Nothing could have been more destructive of Congress' goals in passing the carefully crafted judicial disqualification statutes, or, in this case, more destructive of the public's confidence that a randomly selected judge will not be removed from a civil rights case because of his race.

2. The Allegations Relied on By the Court of Appeals, Even if Judged on the Merits, Do Not Support Recusal.

In the district court, Judge Dyer's careful examination of Auburn's grounds for recusing Judge Clemon showed that those grounds boiled down to assertions that Judge Clemon could not fairly judge a civil rights case because he is black, and because he was active as a citizen and a lawyer in seeking to achieve full civil rights for all people regardless of race. Judge Dyer rightly rejected those offensive suggestions. The two new grounds raised in the court of appeals, growing out of Judge Clemon's service as a State Senator, stand on no stronger footing.

It is true of course that prior activities as a lawyer or as a state legislator create the possibility that one may become involved in episodes or relationships which would require recusal in a given case, but the specific facts shown here reveal no activities or relationships that meet the statutory tests, and Auburn never attempted to show such specific facts.

rule requiring that review of orders denying recusal be by a prompt petition for mandamus, *Union Carbide Corp. v. United States Cutting Service, Inc.*, 782 F.2d 710 (7th Cir. 1986), has special force in this case, where Auburn obviously knew the way to the court of appeals by mandamus since its first petition had been granted.

The court of appeals made no finding that Judge Clemon had "a personal bias or prejudice concerning a party," but instead rested its decision on the other prong of § 455(b)(1), that he had "personal knowledge of disputed evidentiary facts concerning the proceeding." An examination of the three grounds, however, makes it clear that there was no showing of personal knowledge of disputed evidentiary facts nor of any other disqualifying ground under 28 U.S.C. § 455.

As to the first ground, Judge Clemon's role as a lawyer in *Lee v. Macon*, Judge Dyer exhaustively surveyed every aspect and found as a fact that *Lee v. Macon* was distinct from this case. He concluded that "even applying the objective standard of § 455(a), a reasonable man knowing all of the circumstances would not believe Judge Clemon's involvement in *Lee v. Macon* could have provided him with personal knowledge of disputed facts or otherwise create a doubt as to his ability to remain impartial." App. 55a.

As the cases recognize, review in the court of appeals of a district court decision on recusal is governed by strict standards, requiring that facts found by the district court be accepted unless plainly erroneous,¹⁰ and that the district court decision overall be affirmed unless found to be an abuse of discretion.¹¹ The tests for overturning a district court de-

¹⁰ *In re City of Houston*, 745 F.2d 925, 927 (5th Cir. 1984); *Kinnear-Weed Corp. v. Humble Oil & Ref. Co.*, 324 F. Supp. 1371, 1385 (S.D. Tex. 1969), *aff'd*, 441 F.2d 631, 633 (5th Cir.), *cert. denied*, 404 U.S. 941 (1971); *Anderson v. City of Bessmer City*, 470 U.S. 564 (1985).

¹¹ *In re City of Detroit*, 828 F.2d 1160 (6th Cir. 1987); *Mayberry v. Maroney*, 558 F.2d 1159, 1162 (3d Cir. 1977).

cision were not remotely met here, and the court of appeals did not say they were.¹²

The two grounds relating to the incidents while Judge Clemon was in the State Senate are no different, precisely because Auburn eschewed the opportunity to prove that a disqualifying ground did exist, not simply that it could have existed. Unquestionably, legislators are often involved in activities or relationships that may bear on issues they later encounter as judges, but because so many judges come from legislative backgrounds, courts must be especially careful to review the details of the particular activity or relationship to make certain that a judge is not being recused simply because of his prior legislative position.

In this case, the facts actually shown (even including the extra-record material) do not warrant recusal. Auburn's grounds based on Judge Clemon's State Senate position involved two of the most common functions of a state legislator, passing on executive nominations and appropriating money. If, as alleged, Judge Clemon during his several years in the State Senate voted on nominees to various boards, including the boards of state universities, and if he did in that capacity oppose a particular nominee for the Alabama State University Board, the mere fact of that opposition is not enough to require recusal. While there

¹² The court of appeals placed great reliance on the exhibit introduced at trial which had been cited in an earlier *Lee v. Macon* opinion (Muscle Shoals) (in which Judge Clemon had not been involved). This remote and minor matter was clearly insufficient either as supposedly new evidence not available to Judge Dyer or as an indication that he had been plainly erroneous in finding the two cases to be distinct.

might be additional facts concerning this incident, Auburn made no attempt to bring them out, but instead made certain that there would be no opportunity to make any inquiry.

Likewise, if Senator Clemon did co-sponsor a bill to provide funds for Alabama A & M, that is hardly different from what legislators do every day, and is far from a ground for recusal. Again, Auburn presented no additional facts concerning Judge Clemon's efforts on behalf of this bill that would warrant recusal. It is true that the court of appeals found such additional "facts," which it apparently thought were critical, but those "facts" appear to have had no basis whatever, even in Auburn's extra-record documents.¹³

The prior careers of the men and women who become our judges are commonly in public life. Courts have been especially careful to insist that a judge's *nearness* to issues later encountered on the bench, without proof of an actual connection to those issues, is not enough to disqualify. This has been the rule in numerous cases. *E.g.*, *McGrath v. Kristensen*, 340 U.S. 162 (1950); *Laird v. Tatum*, 409 U.S. 824 (1972); *Curry v. Baker*, No. 86-7639 (11th Cir. Sept.

¹³ As to all three grounds, the particular facts of which Judge Clemon is supposed to have had personal knowledge appear to be facts in the public domain, and the court of appeals never explained how they were disputed, i.e., how the racial composition of the boards of trustees, the decline in the number of black school principals, and the fact that A & M had sought capital funding (all of which were undisputed) could constitute "disputed evidentiary facts concerning the proceeding" within the meaning of 28 U.S.C. § 455(b)(1).

24, 1986);¹⁴ *Parrish v. Board of Commissioners*, 524 F.2d 98 (5th Cir. 1975).

In the *Parrish* case, and in a number of others, e.g., *Phillips v. Joint Legislative Comm.*, 637 F.2d 1014 (5th Cir. 1981), *cert. denied*, 456 U.S. 960 (1982), motions to recuse white judges accused of racial prejudice have been denied for lack of a specific showing of actual bias or reasonable appearance of bias. The grounds on which the district judge was ordered recused in this case are not sufficiently distinguishable from the grounds rejected in some of the above cases to prevent the appearance of a dual standard based on a judge's race.

II. PETITIONERS' STANDING

As to the standing issue, the writ of certiorari should be granted because the court of appeals decision denying the university petitioners' standing is in conflict with a recent decision of the Fourth Circuit, *School Board of the City of Richmond v. Baliles*, 829 F.2d 1308, 1310-11 (4th Cir. 1987), as well as with decisions of the Second Circuit, *Aguayo v. Richardson*, 473 F.2d 1090 (2d Cir. 1973), *cert. denied*,

¹⁴ In *Curry v. Baker*, one of the panel members in the court below expressed this view in rejecting a recusal motion based on his longtime service as Chairman of the Alabama Democratic Party. He noted that "at least in this region of the United States, judges who do not have a background of active political participation are the exception rather than the rule," and indicated that if judges were easily subject to challenge based on their prior political background, the great danger would arise that litigants could be in a position to "judge shop" and the "integrity of the entire process [would be] compromised." *Id.* at p.3 (Vance, J.)

414 U.S. 1146 (1974), Sixth Circuit, *Akron Board of Educ. v. State Board of Educ.*, 490 F.2d 1285 (6th Cir. 1974), *cert. denied*. 412 U.S. 932 (1974), Eighth Circuit, *Brewer v. Hoxie School Dist. No. 46*, 238 F.2d 91, 99 (8th Cir. 1956), and decisions of this Court itself. *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1981); *Board of Education v. Allen*, 392 U.S. 236 (1968).

The court of appeals, relying on its earlier decision, App. 5a, held the Board of Trustees of Alabama State University and the Board of Trustees of Alabama A & M University could not request relief against the State of Alabama or any state agencies or state officials. The earlier decision, App. 139a, relied upon a line of cases holding that disputes between arms or creatures of a State do not normally implicate federal rights. It did not, however, consider the cases in other circuits which have allowed claims such as those asserted here when they were brought by state-created entities or their board members, in pursuit of their obligation under the Supremacy Clause to conform their conduct to the federal Constitution or a federal statute.

In such cases, state-created entities or members of boards of state-created entities have uniformly been allowed to sue to enforce the equal protection clause and similar constitutional or statutory provisions.

Many of the decisions occur, as might be expected, in school desegregation cases. In 1956, the Eighth Circuit recognized the standing of a local school board and its members to sue to allow them to carry out their obligation to obey the Constitution:

“[P]laintiffs are under a duty to obey the Constitution . . . It follows as a necessary corollary that they have a federal right to be free from direct and deliberate interference with the performance of the constitutionally imposed duty. The right arises by necessary implication from the imposition of the duty as clearly as though it has been specifically stated in the Constitution.” [*Brewer v. Hoxie School District No. 46*, 238 F.2d 91, 99 (8th Cir. 1956).]

The Sixth Circuit has applied this reasoning to hold that a local school board had standing under the Supremacy Clause to challenge a proposed transfer of a portion of its territory to an adjoining school district.

[T]he Akron Board and its Superintendent have been commanded by action of the state board to participate in conduct leading in the direction of segregation of its school system. Such conduct would place the Board and its members and its Superintendent in the position of violating the Fourteenth Amendment to the United States Constitution. It would subject plaintiffs to being defendants in a suit to restrain conduct which they appear to abhor and which they avow to be unconstitutional. At least theoretically it might subject individual members of the Board and the Superintendent to suits for damages under the Civil Rights Act. 42 U.S.C. 1983. [*Akron Board of Education v. State Board of Education*, 490 F.2d 1285,

1290 (6th Cir.), *cert. denied*, 412 U.S. 932 (1974).]

Most recently, the Fourth Circuit has reaffirmed its earlier ruling to the same effect. *School Board of the City of Richmond v. Baliles*, 829 F.2d 1308 (4th Cir. 1987).

Similar reasoning has led this Court to recognize a school board's standing to challenge state laws and policies that the board believes will interfere with its duty to support the Constitution:

Appellees do not challenge the standing of appellants [a local school board and its members] to press their claim in this Court. Appellants have taken an oath to support the United States Constitution. Believing [the relevant state law provisions] to be unconstitutional, they are in the position of having to choose between violating their oath and taking a step—refusal to comply with [the state law]—that would be likely to bring their expulsion from office and also a reduction of state funds for their school districts. There can be no doubt that appellants thus have a “personal stake in the outcome” of this litigation.

Board of Education v. Allen, 392 U.S. 236, 241 n.5 (1968)(citations omitted). The above principles apply fully in this case, where the Boards of Trustees of Alabama State University and Alabama A & M University were not only faced with the threat of suit but were in fact sued.

The lower court's holding is also contrary to this Court's recent decision in *Washington v. Seattle School*

District No. 1, 458 U.S. 457 (1981), which conferred Fourteenth Amendment standing on a local school board to challenge a statewide initiative that divested local boards of their ability to use busing in order to desegregate district schools. The prior decision below dealt with *Seattle* in a footnote, asserting that the *Seattle* case is distinguishable because that decision "does not trench on a state's political prerogatives." App. 145a. Petitioners believe the court of appeals' analysis offers no basis for distinguishing between the situation of the Seattle school board and the Boards of Trustees of Alabama State University and Alabama A & M University. See also *Papasan v. Allain, Governor*, 92 L.Ed.2d 209 (1986).

The above cases typically involve public officials, like petitioners in this case, who have public duties to perform, and who are obligated to comply with the Constitution in their performance of those duties. In this case, for example, the petitioners have personal obligations, which they assume by taking their oaths of office, to avoid discriminating against their students and others. Where petitioners believe that actions of the State or other state officials interfere with the performance of those constitutional obligations, a suit such as this may often be the only way that petitioners will be able to meet those obligations, and may likewise be the only effective way that the constitutional interests of the students can be protected.

The court of appeals analysis, restricted as it was to the conventional relationships between governmental bodies, ignored the Constitutional obligations of public officials. The decision below conflicts with decisions in this Court and other circuits, and leaves a

significant gap in the means of protecting the constitutional rights of our students.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.¹⁵

¹⁵ Petitioners have conditionally presented the question whether Judge Clemon's December 9 liability ruling was an appealable order. We do not believe that it was, and therefore request that if this Court grants review of the other questions, it consider the appealability question as well. This question is presented conditionally because petitioners are concerned that if this question alone were reached, the result might be simply to vacate the court of appeals decision without deciding anything about recusal; such a result would mean that the decision below (even though vacated for lack of finality) would cloud the further proceedings in the district court by leaving the district judge's status unresolved.

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87-1200

No.

Supreme Court, U.S.

JAN 19 1988

JOSEPH M. ANGL JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

BOARD OF TRUSTEES OF ALABAMA STATE UNIVERSITY;
BOARD OF TRUSTEES OF ALABAMA A & M UNIVERSITY;
JOHN KNIGHT, et al.; and
NORMALITE ASSOCIATION, et al.,

Petitioners,

v.

AUBURN UNIVERSITY; et al.,

Respondents.

**APPENDIX TO PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT**

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-7090

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

JOHN F. KNIGHT, JR., et al., individually and on behalf of
others similarly situated,
Plaintiffs-Intervenors-Appellees,

vs.

THE STATE OF ALABAMA;
GEORGE C. WALLACE, Governor of the State of Alabama;
THE ALABAMA PUBLIC SCHOOL AND COLLEGE AUTHORITY;
THE ALABAMA STATE BOARD OF EDUCATION;
WAYNE TEAGUE, State Superintendent of Education;
AUBURN UNIVERSITY, a public corporation;
THE BOARD OF TRUSTEES FOR THE UNIVERSITY OF
ALABAMA, a public corporation;
TROY STATE UNIVERSITY, a public corporation,
Defendants-Appellants,

BOARD OF TRUSTEES FOR ALABAMA STATE UNIVERSITY, a
public corporation;
THE BOARD OF TRUSTEES FOR ALABAMA A & M
UNIVERSITY, a public corporation,
Defendants.

**Appeal from the United States District Court for
the Northern District of Alabama.**

[Filed October 6, 1987]

OPINION

Before VANCE and KRAVITCH, Circuit Judges, and
BROWN,* Senior Circuit Judge.

PER CURIAM:

I. INTRODUCTION

This case presents claims of racial discrimination in the State of Alabama's system of public higher education. Complaints filed by the United States and a class representing students, graduates, faculty and staff at Alabama State University allege that defendants have failed to take affirmative steps to remove the vestiges of the dual system of higher education that resulted from the State's past policy of racial segregation. The nature of the claims—calling for an analysis of the racial character of public higher education in Alabama since the first public college was organized in 1831—raises a number of difficult and novel questions. Similarly, the nature of the relief sought—including a demand for increased funding and the transfer of programs to the historically black public universities—poses serious problems. By its very nature, this case cries out for a solution reached among the parties themselves. The United States, State of Alabama, Governor of Alabama, Alabama State Board of Education, the governing boards of the ten public universities, and the concerned members of these educational communities are surely in

* Honorable John R. Brown, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

the best position to resolve the important issues this case presents for the future of higher education in Alabama. Their failure of leadership, however, leaves by default the responsibility with the courts. Faced with claims that the defendant institutions have engaged in racially discriminatory practices, the judicial system must examine plaintiffs' claims and, if meritorious, vindicate the constitutional and statutory rights of black Alabamians.

II. BACKGROUND

A. The Complaint of the United States

In January 1981, the United States Department of Education notified the Governor of Alabama of its finding that there remained vestiges of a prior, racially dual system of higher education in Alabama in violation of title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000d. Title VI prohibits discrimination on the basis of race in federally assisted programs. After unsuccessful negotiations over a statewide remedial plan, the Department of Education referred the matter to the Department of Justice pursuant to 42 U.S.C. § 2000d-1.

The United States filed this action on July 11, 1983. The complaint named as defendants the State of Alabama, its Governor, the Superintendent of Education, the State Board of Education, the Alabama Commission on Higher Education, the Alabama Public School and College Authority, and ten public colleges and universities. The complaint charges violations of title VI and the fourteenth amendment of the United States Constitution. According to the United States, prior to 1953 the defendants had "established and maintained a racially dual system of public higher education." The complaint alleged that the enrollment of students and hiring of faculty at all schools in Alabama had been segregated by state law or by policy and practice. The complaint also contended that the two historically black schools, Alabama State University

("ASU") and Alabama A & M University ("A & M"), were continually given less financial support than the white institutions.

The United States alleged that the defendants have perpetuated that racially dual system. The complaint charged that since 1953, the defendants have continued to pursue policies and practices that have resulted in a public higher education system in which the institutions' student bodies, faculties, and governing boards are still substantially segregated by race. The United States requested that defendants be required to develop and implement plans eliminating the vestiges of this racially dual system of public higher education.

B. The Complaint of the Knight Intervenors

In January 1981, John F. Knight, Jr., and others described as students, graduates, faculty and employees of Alabama State University ("Knight intervenors"), filed an action under 42 U.S.C. §§ 1981 and 1983 in the United States District Court for the Middle District of Alabama. They claimed that the continued existence of vestiges of past racial segregation in public higher education in the Montgomery area violated title VI and the fourteenth amendment. These plaintiffs complained of the duplication of the programs at ASU, an historically black institution, by two predominantly white institutions, Auburn University at Montgomery and Troy State University at Montgomery. They argued that the State had failed to carry out its duty to dismantle the dual system of higher education in Montgomery. Their complaint sought merger of these two white institutions into ASU.

On September 15, 1983, the named plaintiffs in Knight v. Wallace moved to intervene in the present action on the ground that its outcome would be determinative of the issues in their case. The district court granted the motion to intervene and certified them as representatives for a class including graduates of ASU; black adults or minor

children in Alabama presently attending, or eligible to attend now or in the future, any public institution of higher education in the Montgomery area; and black citizens who were, are or will become eligible to be employed by such institutions.¹

C. The District Court's Ruling

After extensive discovery and numerous pre-trial motions,² a month-long trial took place before Judge U.W. Clemon in July 1985.³ On December 9, 1985, the district court issued its memorandum opinion, 628 F.Supp. 1137, which held that the state had never fully eliminated the vestiges of its prior, racially dual system of higher education. The lengthy opinion began by discussing the historical development of the dual system of higher education. The court examined the history of each public college in Alabama up to 1965 and found that the colleges were segregated by law and by custom. The court found that during this period black schools were given far less state funding than white colleges. The court also described how "[t]he Board of Education and State of Alabama took various actions which had the effect of stymieing the growth and development of both Alabama A & M and Alabama State College [ASU]."

¹ The district court also realigned A & M and ASU as plaintiffs and permitted these institutions to assert claims under title VI and the fourteenth amendment. In a previous appeal growing out of this lawsuit, this court held that ASU and A & M were instrumentalities of the State and, as such, lacked standing to assert these claims. *United States v. Alabama*, 791 F.2d 1450 (11th Cir.1986), cert. denied, ___ U.S. ___, 107 S.Ct. 1287, 94 L.Ed.2d 144 (1987). Consequently, the realignment of A & M and ASU as plaintiffs was improper.

² One such motion was defendants' attempt to have Judge Clemon disqualified from the case. For a discussion of the lower court's handling of this motion, see *infra* part III, B, 1.

³ Prior to and during the trial, the United States entered into consent decrees with Livingston University, Jacksonville State University, the University of Montevallo, and the University of South Alabama.

The opinion then reviewed the status of each institution of higher education in Alabama in the period between 1965 and 1975 and listed a series of actions undertaken by defendants which continued the racially dual system. The court found that the expansion of the University of Alabama at Huntsville into a full degree-granting institution and the course duplication of Athens State—Calhoun Community College interfered with A & M's ability to recruit white students and faculty. The court also noted that the development of the Montgomery campuses of Auburn University and Troy State University served to duplicate ASU's programs and thus had a negative impact on white enrollment at ASU. In addition, the opinion found that the State's allocation of funds and programs further reinforced ASU and A & M's historical status as second class black institutions.

The court then made detailed findings as to the vestiges of the prior, racially dual system that presently exist in Alabama's institutions of higher education. The opinion examined the student enrollment, faculty employment, and governing boards at each institution. The court found that the student bodies at Auburn, Auburn University at Montgomery, University of Alabama at Huntsville and Athens State College, in addition to those at ASU and A & M, remained identifiable by race. The court also found that the faculties and governing boards of all the institutions were racially identifiable. The district court made a thorough examination of the various policies and programs at each institution that contribute to perpetuating this racially dual system. The court also studied the distribution of funding and program offerings between the traditionally black and white institutions and found that they served to maintain vestiges of past discrimination. The district court rejected defendants challenge to the standing and "systems-wide" approach of plaintiffs and concluded "that the State has not dismantled the dual system of higher education."

The district court ordered the State, the Governor, the Alabama Commission on Higher Education, and the Alabama Public School and College Authority to submit a remedial plan consistent with its findings to "eliminate all vestiges of the dual system." Defendants filed notices of appeal and moved for a stay. On February 14, 1986, this court stayed all further district court proceedings pending disposition of this appeal.⁴

III. ISSUES

On appeal, defendants assert a broad array of error. These claims of error are of two types. Defendants raise a number of threshold issues, contesting whether the trial judge can properly sit on the case and the right of the plaintiffs to bring these claims. Secondly, defendants challenge the district court's decision on the merits, arguing that the factual findings are clearly erroneous and that the lower court applied incorrect legal standards. As a consequence of our rulings on the threshold issues, however, we do not reach the merits of the district court's decision.

A. Appealability

The first issue that this court must address is plaintiffs' contention that the district court's opinion is not an appealable final order.

Plaintiffs argue that the opinion below cannot be a "final order" under 28 U.S.C. § 1291 because the district court has required that a remedial plan still be submitted for adoption by the court. They maintain that no final order exists until the district court actually promulgates its remedial plan. Plaintiffs, however, subscribe to an overly literal view of what constitutes a final order. The Supreme

⁴ Pursuant to the district court's order, several defendants filed their proposed remedial plans on February 14, 1986. This court, however, stayed all district court proceedings on that date.

Court has rejected such a formalistic approach to appealability, noting that “‘final’ within the meaning of § 1291 does not necessarily mean the last order possible to be made in a case.”⁵ As Chief Justice Warren wrote for the Court in *Brown Shoe Co. v. United States*:

The Court has adopted essentially practical tests for identifying those judgments which are, and those which are not, to be considered “final.” A pragmatic approach to the question of finality has been considered essential to the achievement of the “just, speedy, and inexpensive determination of every action”. . . .⁶

The district court’s 99-page opinion in this case is for all practical purposes a final order. In its specificity, detail, and comprehensiveness, the opinion resolves every issue before the court. The district judge leaves defendants with little flexibility in drafting a remedial order consistent “with the findings and the . . . reasonable inferences . . . flowing from the court’s memorandum of opinion.” The opinion clearly spells out the offending policies and practices which must be abolished. The district court gives

⁵ *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152, 85 S.Ct. 308, 311, 13 L.Ed.2d 199 (1964) (citing *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545, 69 S.Ct. 1221, 1225, 93 L.Ed. 1528 (1949)); *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 722 n. 28, 94 S.Ct. 2006, 2022, n. 28, 40 L.Ed.2d 476 (1974).

⁶ 370 U.S. 294, 306, 82 S.Ct. 1502, 1513, 8 L.Ed.2d 510 (1962) (footnotes omitted). See also *Bradley v. School Bd. of Richmond*, 416 U.S. at 722 n. 28, 94 S.Ct. at 2022 n. 28 (“This Court has been inclined to follow a ‘pragmatic approach’ to the question of finality.”) (citing *Brown Shoe Co.*, 370 U.S. at 306, 82 S.Ct. at 1513); *Gillespie v. United States Steel Corp.*, 379 U.S. at 152, 85 S.Ct. at 311 (“[T]his Court has held that the requirement of finality is to be given a ‘practical rather than a technical construction.’”) (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. at 546, 69 S.Ct. at 1225); *Freeman v. Califano*, 574 F.2d 264, 267 (5th Cir.1978) (“This Court has long followed the flexible, practical approach to finality.”). See also Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 Colum. L.Rev. 89 (1975).

detailed instructions in every area, from the finding that sixteen evening extension courses at Calhoun Community College “needlessly duplicat[e]” evening courses offered by A & M, to the finding that Auburn University’s requirement of a minimum ACT score of 18 has an improper disparate impact on black enrollment, to the finding that the faculty at the University of Alabama and Auburn University were paid an average of 28% more than faculty at ASU and A & M. We thus conclude that the decree of the district court in this case possesses sufficient indicia of finality to support an appeal under 28 U.S.C. § 1291.⁷

Our decision follows the reasoning of this court’s predecessor in *Morales v. Turman*.⁸ *Morales* brought a class action attacking the constitutionality of the practices and policies of the Texas juvenile correction system. The district court held that the Texas system had failed to achieve the minimum standards demanded by the constitution. Appellees argued that this ruling was not appealable “because the judge withheld issuance of permanent injunctive relief pending submission of a comprehensive plan to be drawn up by the parties.”⁹ Although conceding that “some flexibility was left to the parties in determining precisely how compliance with the minimum standards would be structured,” this court’s predecessor determined that the district court’s opinion satisfied the “practical” test for finality established by the Supreme Court. The *Morales* court noted that the detailed minimum standards set out by the district court were not “mere guidelines subject to

⁷ See *Brown Shoe Co.*, 370 U.S. at 308, 82 S.Ct. at 1514; cf. *Mahaley v. Cuyahoga Metro. Hous. Auth.*, 500 F.2d 1087 (6th Cir.1974), cert. denied, 419 U.S. 1108, 95 S.Ct. 781, 42 L.Ed.2d 805 (1975); *Thoms v. Heffernan*, 473 F.2d 478 (2d Cir.1973), vacated on other grounds, 418 U.S. 908, 94 S.Ct. 3199, 41 L.Ed.2d 1154 (1974).

⁸ 535 F.2d 864 (5th Cir.1976), rev’d on other grounds, 430 U.S. 322, 97 S.Ct. 1189, 51 L.Ed.2d 368 (1977).

⁹ 535 F.2d at 867 n. 6.

further negotiation by the parties," but instead, "constitute[d] a final adjudication determining the minimal content that must be given to the 'right of treatment' as it applies to virtually every aspect of [the Texas system's] operations."¹⁰ As such, the district court's opinion was a final decision properly appealable under 28 U.S.C. § 1291. Other appeals courts have interpreted § 1291 in a similar fashion and held lower court opinions to be appealable where the opinions are sufficiently detailed, even though a remedial plan had yet to be adopted.¹¹

Plaintiffs rely heavily on *Taylor v. Board of Education of New Rochelle*,¹² citing this case as definitively ruling that a district court opinion finding racial discrimination and ordering authorities to propose a remedial plan is not appealable. It is true that "[a] district court order requiring submission of a plan, without more, is not appealable."¹³

¹⁰ Id.

¹¹ See, e.g., *Mahaley v. Cuyahoga Metro. Hous. Auth.*, 500 F.2d 1087, 1090 n. 3 (6th Cir. 1974) (ruling requiring preparation of plan to provide non-discriminatory, low cost housing held to be appealable final order), cert. denied, 419 U.S. 1108, 95 S.Ct. 781, 42 L.Ed.2d 805 (1975); *Board of Educ. of Oklahoma City Pub. Schools v. Dowell*, 375 F.2d 158 (10th Cir.) (ruling requiring defendants to submit a school desegregation plan consistent with detailed report of an expert panel considered to be appealable), cert. denied, 387 U.S. 931, 87 S.Ct. 2054, 18 L.Ed.2d 993 (1967). Cf. *Brown Shoe Co.*, 370 U.S. 294, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962) (opinion finding a violation of antitrust statutes and ordering divestiture held appealable, despite leaving to further order how divestiture would be accomplished); *Frederick L. v. Thomas*, 557 F.2d 373 (3d Cir.1977) (opinion requiring defendants to submit plan to identify all learning disabled children was appealable under § 1292(a)); *Board of Pub. Instruction v. Braxton*, 326 F.2d 616 (5th Cir.) (opinion requiring defendants to submit school desegregation plan was injunction sufficiently detailed to be appealable under § 1292(a)), cert. denied, 377 U.S. 924, 84 S.Ct. 1223, 12 L.Ed.2d 216 (1964).

¹² 288 F.2d 600 (2d Cir.), cert. denied, 368 U.S. 940, 82 S.Ct. 382, 7 L.Ed.2d 339 (1961).

¹³ *Liddell v. Board of Educ. of St. Louis*, 693 F.2d 721, 723 (8th Cir.1981) (and cases cited therein).

The *Taylor* court followed this general rule in dismissing an appeal from an order directing the school board to submit a desegregation plan. Yet as Judge Friendly, the author of *Taylor*, noted in a later case, there exist "two situations in which the normally non-appealable order to submit a plan may be appealable: when the order contains other injunctive relief, or when the content of the plan to be submitted has already been substantially prescribed by the district court."¹⁴ In *Taylor*, neither of these two exceptions applied since the lower court's determination "that a remedial plan must be submitted provided only a skeletal outline for later adjudication."¹⁵ The facts of the instant case compel a different result, however. A review of the opinion below demonstrates that Judge Clemon has already "substantially prescribed" the remedial plan.¹⁶ Therefore the issues before this court are fixed, and the present appeal is not premature.¹⁷

¹⁴ *Spates v. Manson*, 619 F.2d 204, 209 (2d Cir.1980).

¹⁵ *Id.* (quoting *Frederick L. v. Thomas*, 557 F.2d 373, 380-81 (3d Cir.1977)).

¹⁶ A strong argument could also be made that the lower court's opinion in this case is an injunction appealable pursuant to § 1292(a) because it compels the preparation of a plan dealing expressly with a detailed list of acts. See *Board of Pub. Instruction v. Braxton*, 326 F.2d 616 (5th Cir.), cert. denied, 377 U.S. 924, 84 S.Ct. 1223, 12 L.Ed.2d 216 (1964); *Frederick L. v. Thomas*, 557 F.2d 373 (3d Cir.1977).

¹⁷ A pre-implementation order, however, may also be reviewable as "final." Although a pre-implementation order adjudging liability but leaving the quantum of relief for subsequent determination is normally non-final and non-appealable, this general rule does not always hold in institutional civil rights litigation. District court orders establishing violations frequently specify minimum legal standards that serve as a blueprint for remedy implementation. Where the standards are specific, most issues can be resolved by immediate review and the danger of piecemeal appellate review is minimal.

Note, *The Remedial Process in Institutional Reform Litigation*, 78 Colum.L.Rev. 784, 846 (1978) (footnotes omitted).

B. The Disqualification Issue

1. Procedural Background

Appellants argue that the lower court erred in not disqualifying Judge Clemon from deciding this case. Before reaching the substance of this claim, however, we outline the complicated procedural history of this issue.

On September 6, 1983, Auburn University moved to disqualify Judge Clemon pursuant to 28 U.S.C. §§ 144 and 455. Three days later, the State Superintendent of Education Wayne Teague filed a similar motion. These motions were accompanied by affidavits, signed by the respective attorneys for these parties, setting forth various facts in support of the motions. Judge Clemon denied the recusal motions. The judge ruled that the affidavits did not meet the technical requirements of 28 U.S.C. § 144 since they were not executed by a party and that a reasonable person, viewing the true facts, would not harbor doubts concerning his impartiality. Auburn then filed a petition for a writ of mandamus. A panel of this court held that a later affidavit executed by the President of Auburn University met the technical requirements of 28 U.S.C. § 144 and remanded with directions that another judge be assigned to hear the recusal motion.¹⁸

Senior District Judge Hobart Grooms was assigned the recusal proceedings, held a hearing and received evidence in the matter. On December 19, 1983, Judge Grooms issued an order granting the motions to disqualify Judge Clemon. Judge Grooms concluded that Judge Clemon's involvement as a counsel of record in *Lee v. Macon County Board of Education* gave him "personal knowledge of disputed evidentiary fact." Judge Grooms also concluded that Judge Clemon's personal and political relationship with former Senator Stewart, then attorney of record for defendant Alabama A & M, raised the appearance of bias.

¹⁸ *In re: Auburn University*, No. 83-7557 (11th Cir. Nov. 10, 1983).

On January 19, 1984, however, Judge Grooms vacated his order and recused himself.¹⁹ Senior Circuit Judge David Dyer then heard defendants' disqualification motions and denied the motions. Judge Dyer found no evidence that Judge Clemon's association with former Senator Stewart would affect the judge's impartiality and concluded that the affidavits did not connect Judge Clemon's involvement in *Lee v. Macon* to any aspect of the present case. Judge Dyer also denied Auburn's request to certify the issue for interlocutory appeal under 28 U.S.C. § 1292(b). As a result, Judge Clemon presided over and decided this non-jury case.

2. Legal Standard

"The guarantee to the defendant of a totally fair and impartial tribunal, and the protection of the integrity and dignity of the judicial process from any hint or appearance of bias is the palladium of our judicial system."²⁰ To ensure that the courts remain above reproach, the Congress passed statutory provisions governing the disqualification of federal judges. The relevant statutes are 28 U.S.C. §§ 144 and 455.²¹ These two statutes control appellants' claim that

¹⁹ Appellants imply that Judge Grooms was pressured to recuse himself by harsh public criticism attributed to Judge Clemon by the media. They argue that these statements are clear evidence of the trial judge's personal bias against them. We do not find it necessary to reach this issue.

²⁰ *United States v. Columbia Broadcasting Sys.*, 497 F.2d 107, 109 (5th Cir.1974).

²¹ 28 U.S.C. § 144 provides:

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding. The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party

the lower court erred in failing to disqualify Judge Clemon from presiding over this case.²²

Disqualification under § 144 requires that a party file an affidavit demonstrating the judge's personal bias or

may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

28 U.S.C. § 455 provides, in pertinent part:

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness

prejudice against that party or in favor of an adverse party. The statute mandates that the affidavit be filed within a specified time period and that it be accompanied by a certificate of good faith by a counsel of record. If an affidavit is timely and technically correct, the trial judge may not pass upon the truthfulness of the facts stated in the affidavit even when the court knows these allegations to be false. The statute restricts the trial judge to determining whether the facts alleged are legally sufficient to require recusal.²³ The test for legal sufficiency adopted by this Court requires a party to show:

1. The facts are material and stated with particularity;
2. The facts are such that, if true they would convince a reasonable person that a bias exists.

in the proceeding.

* * *

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

²² The right to a fair trial before an impartial judge is a basic requirement of due process and thus guaranteed by the United States Constitution. However, because the statutory grounds for disqualification are stricter than the requirements of due process, it is not necessary to address the constitutional dimensions of disqualification. See Hjelmfelt, *Statutory Disqualification of Federal Judges*, 30 U.Kan.L.Rev. 255, 255(1982) (hereinafter *Statutory Disqualification*).

²³ *United States v. Serrano*, 607 F.2d 1145, 1150 (5th Cir.1979), cert. denied, 445 U.S. 965, 100 S.Ct. 1655, 64 L.Ed.2d 241 (1980); *Davis v. Board of School Comm'rs*, 517 F.2d 1044, 1051 (5th Cir.1975), cert. denied, 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed.2d 188 (1976). See also *Berger v. United States*, 255 U.S. 22, 41 S.Ct. 230, 65 L.Ed. 481 (1921) (construing a predecessor statute).

3. The facts show that the bias is personal, as opposed to judicial, in nature.²⁴

In 1974, Congress rewrote 28 U.S.C. § 455 to correct perceived problems in the disqualification statutes. Prior to 1974, both the technical and legal sufficiency requirements of § 144 had been construed strictly in favor of judges.²⁵ Courts also operated under the so-called "duty to sit" doctrine which required a judge to hear a case unless a clear demonstration of extrajudicial bias or prejudice was made.²⁶ Consequently, disqualification of a judge was difficult under § 144. In passing the amended 28 U.S.C. § 455, Congress broadened the grounds and loosened the procedure for disqualification in the federal courts. Although a party still is permitted to make a motion and submit affidavits to bring about a judge's disqualification, the statute places a judge under a self-enforcing obligation to recuse himself where the proper legal grounds exist.²⁷ The statute also did away with the "duty to sit"²⁸ so the benefit of the doubt is now to be resolved in favor of recusal. Section 455(a) requires a judge to disqualify himself when "his impartiality might reasonably be questioned." Thus, under § 455(a) an actual demonstrated

²⁴ *Parrish v. Board of Comm'rs of Alabama State Bar*, 524 F.2d 98, 100 (5th Cir.1975) (en banc), cert. denied, 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed.2d 188 (1976) (quoting *United States v. Thompson*, 483 F.2d 527, 528 (3d Cir.1973)).

²⁵ See *Selfridge v. Gynecol, Inc.*, 564 F.Supp. 57, 58(D.Mass.1983) (quoting 13 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3551, at 374 (1975)); Hjelmfelt, *supra*, note 22, at 256.

²⁶ See *Parrish v. Board of Comm'rs of Alabama State Bar*, 524 F.2d at 103; *United States v. Jaramillo*, 745 F.2d 1245, 1249 (9th Cir.1984), cert. denied, 471 U.S. 1066, 105 S.Ct. 2142, 85 L.Ed.2d 499 (1985); *Blizard v. Frechette*, 601 F.2d 1217, 1220 (1st Cir.1979).

²⁷ *Davis v. Board of School Comm'rs*, 517 F.2d at 1051.

²⁸ *Parrish v. Board of Comm'rs of Alabama State Bar*, 524 F.2d at 103; H.R.Rep. No. 1453, 93d Cong., 2d Sess. 5, reprinted in 1974 U.S.Code Cong. & Admin.News 6351, 6355.

prejudice need not exist in order for a judge to recuse himself: "disqualification should follow if the reasonable man, were he to know all the circumstances, would harbor doubts about the judge's impartiality."²⁹ Congress expressly intended the amended § 455 to promote public confidence in the impartiality of the courts by eliminating even the appearance of impropriety.³⁰ Although the courts retained the requirement that the alleged bias or prejudice "stem from an extrajudicial source" and now permitted the factual accuracy of affidavits submitted under § 455 to be scrutinized,³¹ the general effect of this statute was to liberalize greatly the scope of disqualification in the federal courts.

The amended § 455 also established a number of bright line rules for disqualification. Mandatory disqualification is provided for in certain situations where the potential for conflicts of interest are readily apparent. For example, under subsection (b), a judge must disqualify himself when he has a financial interest or when a member of his family "within the third degree of relationship" is a party or lawyer in the case. The statute also states that the parties

²⁹ *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1111 (5th Cir.), *cert. denied*, 449 U.S. 820, 101 S.Ct. 78, 66 L.Ed.2d 22 (1980).

³⁰ See H.R.Rep. No. 1453, 93d Cong., 2d Sess. 5, *reprinted in* 1974 U.S.Code Cong. & Admin. News at 6355 (amendment to § 455 "is designed to promote public confidence in the impartiality of the judicial process").

³¹ See, e.g., *Hamm v. Members of Bd. of Regents of Florida*, 708 F.2d 647, 651 (11th Cir.1983); *Phillips v. Joint Legislative Comm.*, 637 F.2d 1014, 1019 n. 6, 1020 (5th Cir. Unit A 1981), *cert. denied*, 456 U.S. 960, 102 S.Ct. 2035, 72 L.Ed.2d 483 (1982); *In re International Business Machines Corp.*, 618 F.2d 923, 927-29 (2d Cir.1980); see also 13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure*, §§ 3542 & 3550.

cannot waive the *per se* rules of disqualification set out in § 455(b).³²

3. Discussion

Defendants assert a number of grounds for the disqualification of Judge Clemon. Defendants first allege in their affidavits that Judge Clemon has two minor children and thus is disqualified because these children are members of the plaintiff class. Judge Clemon proudly admits to having two children who were ages 9 and 16 at the time of appellants' motions. The class certified by the trial judge includes all children "who are eligible to attend or who will become eligible to attend the public institutions of higher education in the Montgomery, Alabama, area." Consequently, Judge Clemon's children are technically members of this class and possess an interest in the outcome of this litigation. Section 455 provides for disqualification where the judge knows that a "minor child residing in his household, has a financial interest . . . or any other interest that could be substantially affected by the outcome of the proceeding"³³ or if "[h]e or his spouse, or a person within the third degree of relationship . . . is a party to the proceeding."³⁴ Defendants argue that the trial judge should be disqualified under the terms of this provision.

We conclude that the interests of Judge Clemon's children are not "substantial" enough to merit disqualification. Any beneficial effects of this suit upon these children were remote, contingent and speculative. There is no evidence that Judge Clemon's children have any desire or inclination to attend a Montgomery area institution. Any potential interest, moreover, is shared by all young black Alabamians. "[A]n interest which a judge has in common with

³² 28 U.S.C. § 455(e). This subsection does provide for waiver of claims raised under § 455(a) after full disclosure by the trial judge.

³³ 28 U.S.C. § 455(b)(4).

³⁴ 28 U.S.C. § 455(b)(5).

many others in a public matter is not sufficient to disqualify him.”³⁵ In similar circumstances where federal judges have possessed speculative interests as members of large groups, the federal courts have held these interests to be too attenuated to warrant disqualification. The courts also have concluded that no personal bias or reasonable doubt about the judge’s impartiality exists in these circumstances.³⁶ Most significant for our decision here is the Fifth Circuit’s *In re City of Houston*.³⁷ In that case the Fifth Circuit addressed a challenge to a black judge in a voting rights action in which the judge was a class member. The court denied the motion to disqualify, ruling that the posture of the trial judge—possessing an attenuated non-pecuniary interest no different from that of the general voting public in Houston—was not what Congress intended to proscribe in drafting §§ 144 and 455. We reach the same conclusion here.

To disqualify Judge Clemon on the basis of his children’s membership in the plaintiff class also would come dangerously close to holding that minority judges must disqualify themselves from all major civil rights actions. As the *In re Houston* court noted:

Many civil rights suits are brought in the form of class actions. Considering the broad declaratory and injunctive relief that federal courts are called upon to

³⁵ *In re City of Houston*, 745 F.2d 925, 929-30 (5th Cir.1984) (quoting 48A C.J.S. Judges § 123 (1981)).

³⁶ *In Christiansen v. National Savings and Trust Co.*, 683 F.2d 520, 525-26 (D.C.Cir.1982), for example, the class was defined as “all federal employees who were Blue Cross and Blue Shield subscribers.” There, the court held that the “interest of subscribing judges is too contingent and remote.” *Id.* at 526. Trial judges also have been permitted to preside over massive antitrust suits against utility companies with whom they are customers. *In re New Mexico Natural Gas Antitrust Litigation*, 620 F.2d794 (10th Cir.1980); *In re Virginia Elec. & Power Co.*, 539 F.2d 357 (4th Cir.1976).

³⁷ 745 F.2d 925 (5th Cir.1984).

dispense, it is hard to imagine a case in which a minority judge would not have a family member within the class. . . .³⁸

To disqualify minority judges from major civil rights litigation solely because of their minority status is intolerable. This court cannot and will not countenance such a result. The recusal statutes do not contemplate such a double standard for minority judges. The fact that an individual belongs to a minority does not render one biased or prejudiced, or raise doubts about one's impartiality: "that one is black does not mean, *ipso facto*, that he is anti-white; no more than being Jewish implies being anti-Catholic, or being Catholic implies being anti-Protestant."³⁹ Defendants' argument cuts too broadly since every Alabama judge with children, whether members of the class or not, has an interest in the future of the state university system.⁴⁰ As Judge Higginbotham eloquently wrote:

It would be a tragic day for the nation and the judiciary if a myopic vision of the judge's role should prevail, a vision that required judges to refrain from participating in their churches, in their non-political community affairs, in their universities. So long as Jewish judges preside over matters where Jewish and

³⁸ *Id.* at 930. It also is interesting to note that the class in the instant case includes "Black citizens who were, are or will become eligible to be employed by the public institutions of higher education in the Montgomery, Alabama, area." Judge Clemon therefore is arguably a member of the class and disqualified under appellants' theory, since he could become a professor or employee at one of these institutions.

³⁹ *Pennsylvania v. Local 542, Int'l Union of Operating Engineers*, 388 F.Supp. 155, 163 (E.D.Pa.1974).

⁴⁰ See *In re City of Houston*, 745 F.2d 925 (5th Cir.1984) (interests of all voters in Houston implicated in voting rights suit); cf. *Parrish v. Board of Comm'rs of Alabama State Bar*, 524 F.2d 98, 103 (5th Cir.1975) (en banc) (all judges in the circuit were members of segregated bar associations at one time), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed.2d 188 (1976).

Gentile litigants disagree; so long as Protestant judges preside over matters where Protestant and Catholic litigants disagree; so long as white judges preside over matters where white and black litigants disagree, I will preside over matters where black and white litigants disagree.⁴¹

Nor can we countenance defendants' claim that Judge Clemon is prejudiced and no longer impartial by virtue of his background as a civil rights lawyer. Appellants point to Judge Clemon's representation of black plaintiffs in race discrimination actions prior to joining the bench as evidence of personal bias in this action. It is well settled that "the facts pleaded . . . will not suffice to show the personal bias required by the statute if they go to the background and associations of the judge rather than to his appraisal of a party personally."⁴² All judges come to the bench with a background of experiences, associations, and viewpoints. As Justice Rehnquist commented, proof that a judge's mind was a complete tabula rasa would be evidence of lack of qualification, not lack of bias.⁴³ A judge is not required to recuse himself merely because he holds and has expressed certain views on a general subject.⁴⁴ We conclude that

⁴¹ *Pennsylvania v. Local 542, Int'l Union of Operating Engineers*, 388 F.Supp at 181. See also *In re City of Houston*, 745 F.2d 925 (5th Cir.1984); *Paschall v. Mayone*, 454 F.Supp. 1289 (S.D.N.Y.1978); *Blank v. Sullivan & Cromwell*, 418 F.Supp 1 (S.D.N.Y.1975).

⁴² *Paschall v. Mayone*, 454 F.Supp. 1289 (S.D.N.Y.1978) (quoting *Pennsylvania v. Local 542, Int'l Union of Operating Engineers*, 388 F.Supp. at 159); accord *Parrish v. Board of Comm'rs of Alabama State Bar*, 524 F.2d at 101; *Home Placement Service, Inc. v. Providence Journal Co.*, 739 F.2d 671, 675 (1st Cir.1984), cert. denied, 469 U.S. 1191, 105 S.Ct. 964, 83 L.Ed.2d 969 (1985); *Parker Precision Products Co. v. Metropolitan Life Ins. Co.*, 407 F.2d 1070, 1077-78 (3d Cir.1969).

⁴³ *Laird v. Tatum*, 409 U.S. 824, 835, 93 S.Ct. 7, 14, 34 L.Ed.2d 50 (1972) (Rehnquist, J., mem.).

⁴⁴ For example, Justice Rehnquist sat in *Laird v. Tatum* which he had previously discussed while testifying before Congress; Justice

Judge Clemon's background representing plaintiffs in civil rights actions does not warrant disqualification.⁴⁵

Similarly, the views expressed by Judge Clemon as a political figure and member of the Alabama State Senate do not mandate disqualification.⁴⁶ As judges on this court

Frankfurter sat in labor cases despite having written extensively in the field before going to the Supreme Court; Chief Justice Hughes sat in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703 (1937), despite having written a book addressing the issue raised in the case. See *Laird v. Tatum*, 409 U.S. at 831-833, 93 S.Ct. at 11-12. It should be noted, however, that a stronger "duty to sit" may exist for Supreme Court Justices due to the potential for deadlock in the nation's highest court.

⁴⁵ See, e.g., *Laird v. Tatum*, 409 U.S. 824, 93 S.Ct. 7, 34 L.Ed.2d 50 (1972); *Rosquist v. Soo Line Railroad*, 692 F.2d 1107, 1112 (7th Cir.1982); *Barry v. United States*, 528 F.2d 1094 (7th Cir.), cert. denied, 429 U.S. 826, 97 S.Ct. 81, 50 L.Ed.2d 88 (1976); *Association of Nat'l Advertisers, Inc. v. F.T.C.*, 627 F.2d 1151, 1171 n. 51 (D.C. Cir.1979), cert. denied, 447 U.S. 921, 100 S.Ct. 3011, 65 L.Ed.2d 1113 (1980); *Idaho v. Freeman*, 507 F.Supp. 706, 728 (D.Idaho 1981); *Paschall v. Mayone*, 454 F.Supp. 1289, 1301 (S.D.N.Y.1978); *Blank v. Sullivan & Cromwell*, 418 F.Supp. 1, 4-5 (S.D.N.Y.1975); *Pennsylvania v. Local 542, Int'l Union of Operating Engineers*, 388 F.Supp. 155 (E.D.Pa.1974).

⁴⁶ Appellants' affidavits also assert that Judge Clemon had a personal and political relationship with former Senator Donald Stewart, then counsel of record for defendant Alabama A & M. Appellants argue that this relationship raised questions about Judge Clemon's impartiality. 28 U.S.C. § 455(a). The record shows, however, that Stewart ended his representation of A & M several months before trial. The evidence also fails to demonstrate the kind of close personal ties that would affect the trial judge's judgment. See *Home Placement Service, Inc. v. Providence Journal Co.*, 739 F.2d 671 (1st Cir.1984) (judge's relationship with Senator who was responsible for his appointment did not necessitate disqualification in case involving Senator's former law firm and Senator's cousin), cert. denied, 469 U.S. 1191, 105 S.Ct. 964, 83 L.Ed.2d 969 (1985); *Warner v. Global Natural Resources*, 545 F.Supp. 1298 (S.D. Ohio 1982) (judge not disqualified where plaintiff was an acquaintance who had supported his nomination to federal bench). See also *Parrish v. Board of Comm'rs of Alabama State Bar*, 524 F.2d at 102; *In re Beard*, 811 F.2d 818, 828 (4th Cir.1987); *Firnhaber v. Sen-senbrenner*, 385 F.Supp. 406, 411-12 (E.D.Wis.1974); cf. *United States*

have recognized, "[i]t appears to be an inescapable part of our system of government that judges are drawn primarily from lawyers who have participated in public and political affairs."⁴⁷ Since the funding and control of public institutions in the instant case are important issues in the Alabama political arena, it is not surprising that Judge Clemon took public positions concerning these institutions prior to becoming a judge. The fact that prior to joining the bench a judge has stated strong beliefs does not indicate that he has prejudged the legal question before him. As noted above, judges have frequently heard cases concerning subjects about which they have previously expressed some views.⁴⁸

Judge Clemon's involvement in the issues before this court went beyond the mere making of public statements, however. During his tenure in the state legislature, the trial judge actively participated in the very events and shaped the very facts that are at issue in this suit.⁴⁹ As

v. Murphy, 768 F.2d 1518, 1537-38 (7th Cir.1985), *cert. denied*, — U.S. —, 106 S.Ct. 1188, 89 L.Ed.2d 304 (1986).

⁴⁷ *Curry v. Baker*, No. 86-7639 (11th Cir. September 24, 1986) (Vance, J., mem.). See also *Home Placement Service, Inc. v. Providence Journal Co.*, 739 F.2d 671, 675 (1st Cir.1984) ("It is common knowledge, or at least public knowledge, that the first step to the federal bench for most judges is either a history of active partisan politics or strong political connections. . ."), *cert. denied*, 469 U.S. 1191, 105 S.Ct. 964, 83 L.Ed.2d 969 (1985).

⁴⁸ See *supra* notes 43-45 and accompanying text.

⁴⁹ Appellees argue that this court must not consider Judge Clemon's activities as a state Senator since these facts were not presented to Judge Dyer. The question of whether considerations of timeliness apply under § 455 is a difficult one. Despite the Justice Department's recommendation, see H.R.Rep. No. 1453, 93d Cong., 2d Sess. 9, reprinted in 1974 U.S.Code Cong. & Admin.News at 6358, Congress did not incorporate a time limitation into the amended statute, and courts have differed as to whether the timeliness requirement of the prior § 455 survived. Compare, e.g., *In re International Business Machines Corp.*, 618 F.2d 923 (2d Cir.1980) with *SCA Services, Inc. v. Morgan*, 557

chairman of the Senate Rules Committee, Judge Clemon played a critical role in the confirmation of those individuals nominated for positions on the board of trustees of the defendant institutions. Judge Clemon shaped the composition of these governing boards by acting along with other members of his committee to prevent nominations from reaching the Senate floor. For example, press accounts indicate that Judge Clemon was instrumental in preventing the confirmation of Thomas Radney to the Board of Trustees of ASU and that Judge Clemon opposed the nomination on the explicit grounds that Radney's confirmation would have created a white majority on the ASU

F.2d 110 (7th Cir.1977). In *United States v. Slay*, 714 F.2d 1093 (11th Cir.1983), *cert. denied*, 464 U.S. 1050, 104 S.Ct.729, 79 L.Ed.2d 189 (1984), this court applied a timeliness requirement to the disqualification claim brought under § 455(a), but not to a claim brought under § 455(b)(1). See also Note, *Disqualification of Federal Judges for Bias or Prejudice*, 46 U.Chi.L.Rev. 236, 265 (1978). Even if the principle of timeliness has some application to motions brought under § 455(b), it would be inappropriate to apply this principle under the circumstances of this case. Those courts that have adopted a timeliness requirement have done so "to prevent litigants from abusing motions to disqualify as dilatory tactics or as a means to 'sample the temper of the court' before deciding whether to raise an issue of disqualification." *City of Cleveland v. Cleveland Elec. Illuminating Co.*, 503 F.Supp. 368, 381 (N.D. Ohio 1980) (quoting *United States v. Conforte*, 457 F.Supp. 641, 654 n. 7 (D.Nev.1978), *aff'd*, 624 F.2d 869 (9th Cir.) *cert. denied*, 449 U.S. 1012, 101 S.Ct. 568, 66 L.Ed.2d 470 (1980)); see also *Delesdernier v. Porterie*, 666 F.2d 116, 122 n. 4 (5th Cir.), *cert. denied*, 459 U.S. 839, 103 S.Ct. 86, 74 L.Ed.2d 81 (1982). Appellants here were not acting to delay or to speculate on a favorable substantive judgment in the interim. Motions to disqualify Judge Clemon were filed at the earliest stages of the litigation and aggressively prosecuted throughout. Appellants did not discover relevant information about Judge Clemon's activities as a state legislator until late in the litigation, and raised this ground for disqualification at the first available moment. See *Miller Indus., Inc. v. Caterpillar Tractor Co.*, 516 F.Supp. 84, 89-90 (S.D. Ala. 1980); *Delesdernier v. Porterie*, 666 F.2d at 122 n. 4; *Cleveland Elec. Co.*, 503 F.Supp. at 381. Given the critical importance of the appearance of impartiality guaranteed by § 455, we refuse to adopt the cramped interpretation of this statute asserted by appellees here.

board. Regardless of whether the specific allegation concerning the Radney nomination is true, it is clear that Judge Clemon's activities in the Senate were relevant to and plainly affected the ultimate outcome of the nomination and confirmation process for the board of trustees of the defendant institutions. Yet Judge Clemon explicitly found at trial that the composition of defendants' governing boards was a relevant and important factor in his finding of liability. In determining whether the dual system had been disestablished, "considerations of the racial identifiability of the . . . governing boards are probative." His opinion examines in detail the racial composition of the board of trustees for each institution of public higher education in Alabama. In his examination of the composition of these governing boards, Judge Clemon was in part examining his own handiwork.

While in the statehouse, Judge Clemon also helped spearhead a bill to appropriate \$10,000,000 to Alabama A & M. Judge Clemon cosponsored this bill which was intended to provide capital funds to improve A & M's physical plant. The stated premise of this bill was that the facilities of A & M were inferior to those of the historically white universities. Despite then Senator Clemon's best efforts to gain passage of this bill aiding A & M physical plant, the bill failed in the legislature. At trial, A & M cited the defeat of this bill as evidence of racial animus. Thus Judge Clemon was again forced to make factual findings about events in which he was an active participant. At trial, he found the "extent of renovations over the last 30 years at A & M to be wanting." Judge Clemon also detailed the poor physical conditions at A & M and found the "Alabama's choice of resource allocation for facilities for the period 1965 to 1983 significantly impaired the ability of Alabama State and A & M to attract white students." Regardless of the accuracy of these findings, Judge Clemon was making factual determinations about bills and legislative fights in which he played an active part.

The trial judge's activities as a private lawyer also involved him in the disputed evidentiary facts of this case. Judge Clemon served as an attorney of record for individual plaintiffs in the school desegregation case of *Lee v. Macon County Board of Education*.⁵⁰ Filed in 1970, *Lee v. Macon* included claims under title VI of the Civil Rights Act against many of the same institutions of higher learning as appear here. These claims took place during periods of time which are relevant to the present case under the "vestiges" theory utilized by plaintiffs. In denying the recusal motion, Judge Clemon stated that he took no part in the portion of *Lee v. Macon* involving institutions of higher education. He noted that the caption of *Lee v. Macon* was used in many smaller actions that grew out of the original suit. According to Judge Clemon, his involvement was restricted to the representation of black high school principals in a race discrimination suit. Even this limited involvement in *Lee v. Macon*, however, left Judge Clemon with knowledge of facts that were in dispute in the instant case. The State's treatment of black high school principals during the period the trial judge represented their cause became a factual issue at trial. Plaintiff presented testimony about the long, continuous history of racially discriminatory employment practices suffered by black high school principals in Alabama. A study also was offered "for the purpose of demonstrating that there was, during the period covered [1966-1970], a decrease, substantial decrease in the number of percentage in black educators in Alabama in general and black principals in particular." Over defendants' objection, the trial judge accepted in evidence the testimony and exhibits about the status of Alabama's black high school principals. Judge Clemon admitted this evidence as relevant to prove "that as a vestige of the prior de jure system, the state enforced and pursued racially discriminatory employment practices

⁵⁰ 317 F.Supp. 103 (M.D.Ala.1970), *aff'd in part, modified in part*, 453 F.2d 524 (5th Cir.1971).

during the period covered by the study." On this issue—whether black high school principals suffered racial discrimination—Judge Clemon was once again faced with evaluating evidence of which he had special extrajudicial knowledge.

The language of § 455(b) is unequivocal: [A judge] shall also disqualify himself in the following circumstances:

(1) Where he has . . . *personal knowledge of disputed evidentiary facts* concerning the proceeding.⁵¹

The Reporter's Notes to the Code of Judicial Conduct are equally clear: "The Committee also concluded that a judge cannot be, or cannot appear to be, impartial if he has personal knowledge of evidentiary facts that are in dispute."⁵² Judge Clemon's disqualification is thus mandated because of his involvement in the disputed factual issues surrounding the composition of defendants' governing boards, the legislative efforts to improve A & M's physical plant, and the State's treatment of black high school principals. Such personal knowledge vitiates the carefully constructed rules of procedure and evidence that ensure deliberate, unbiased fact finding. Litigants also are entitled to have their case decided by a judge who can approach the facts in a detached, objective fashion. Judge Clemon's partisan efforts in these disputes raise legitimate questions about his impartiality in deciding these factual matters. To permit Judge Clemon to decide a case in which he had extrajudicial, personal knowledge of disputed facts would

⁵¹ 28 U.S.C. § 455(b) (emphasis added).

⁵² Thode, Reporter's Notes to Code of Judicial Conduct, 62 (1973). Section 455(b)(1) was taken from a comparable provision of the Code of Judicial Conduct.

be contrary to the express language and underlying spirit of the statute, as well as the case law.⁵³

This court is not impervious to the burden that disqualification at this juncture places on the court system, the litigants, and the people of Alabama. We recognize that new proceedings before a new judge will exact a not inconsiderable cost in time, energy, and legal fees.⁵⁴ The intensity and complexity of this litigation, however, is a measure of its significance. We consider the future of higher education in Alabama too important to be decided under a cloud. In a decision such as this one, a decision which will affect millions of Alabamians, public confidence in the judicial system demands a judge free from personal knowledge or biases about the issues before the court. For

⁵³ Courts have found recusal mandated in cases in which the judge's personal knowledge was considerably less extensive and relevant. In one particularly striking example, a judge recused himself on the basis of his activities as a state legislator forty years earlier even though he confessed that he had absolutely no recall of what actions, if any, he took. *Limeco, Inc. v. Division of Lime*, 571 F.Supp. 710 (N.D.Miss.1983). See also *United States v. Yagid*, 528 F.2d 962, 965 (2d Cir.1976); *W. Clay Jackson Enter., Inc. v. Greyhound Leasing & Fin. Corp.*, 467 F.Supp. 801 (D.P.R.1979). See generally *Price Bros. Co. v. Philadelphia Gear Corp.*, 629 F.2d 444, 447 (6th Cir.1980.).

Appellees' reliance on Justice Rehnquist memorandum opinion in *Laird v. Tatum*, 409 U.S. 824, 93 S.Ct. 7, 34 L.Ed.2d 50 (1972), and the cases cited therein, is inapposite. Justice Rehnquist took pains to refute the allegation that he had any personal knowledge of the case. *Id.* at 827-28, 93 S.Ct. at 10. Although Justice Rehnquist and the other judges discussed in his memorandum had strong views, they did not have special knowledge of any disputed facts. It also is noteworthy that Laird and the cases Rehnquist discusses were decided prior to the abolition of the 'duty to sit' doctrine. *Id.* at 837, 93 S.Ct. at 14.

⁵⁴ The trial in *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101 (5th Cir.), cert. denied, 449 U.S. 820, 101 S.Ct. 78, 66 L.Ed.2d 22 (1980), lasted thirty-three days and "spawned" a record of twenty-five volumes. Nevertheless, this circuit ruled that the trial judge should have disqualified himself and remanded for a new trial.

this reason, we disqualify Judge Clemon and remand for a new trial.⁵⁵

C. Title VI Claims

The complaint of the United States asserts that this action was brought pursuant to the fourteenth amendment of the United States Constitution and title VI of the Civil Rights Act of 1964. Defendants challenge the authority of the United States to bring this suit under these provisions. Specifically, defendants argue that the Attorney General lacks the statutory authority necessary to establish standing in an action under the fourteenth amendment. Defendants also argue that the government failed to comply with the program specificity requirement of title VI when it treated the various institutions of public higher education in Alabama as part of a single system. In its brief and oral argument before this court, the United States conceded that the Attorney General lacked the authority to proceed under the fourteenth amendment.⁵⁶ Thus the issue before this court is whether the broad systemic

⁵⁵ In remanding for a new trial, we express no opinion as to Judge Clemon's handling of the lawsuit. As the Fifth Circuit noted:

[I]t makes no difference how much practical effect [the trial judge's recusal] would have had on the outcome of the litigation. The purpose of the disqualification statute is to avoid even the appearance of impropriety; the appearance of impropriety is not lessened by the fact that the litigation would have come out the same anyway. Cf. Wright & Miller, *supra*, § 3553 ("[t]here should be no room in [the recusal] context for the concept of harmless error to apply, nor for arguments to be made that in fact the judge acted in an impartial manner").

Health Serv. Acquisition Corp. v. Liljeberg, 796 F.2d 796 (5th Cir.1986), cert. granted, — U.S. —, 107 S.Ct. 1368, 94 L.Ed.2d 684 (1987).

⁵⁶ A number of courts have rejected an expansive view of the Attorney General's fourteenth amendment standing. See, e.g., *United States v. City of Philadelphia*, 644 F.2d 187 (3d Cir.1980); *United States v. Mattson*, 600 F.2d 1295 (9th Cir.1979); *United States v. Solomon*, 563 F.2d 1121 (4th Cir.1977).

approach adopted by the United States is permissible under title VI of the Civil Rights Act of 1964.

Title VI is spending power legislation. It rests on the principle that "taxpayers' money, which is collected without discrimination, shall be spent without discrimination."⁵⁷ Title VI is a typical "contractual" spending power provision, "extending an option" to potential recipients to accept or reject federal monies depending on whether they are willing to end discrimination.⁵⁸ The precise language of title VI states:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.⁵⁹

The complaint of the United States does not specify which programs and activities within the defendant institutions receive federal funds or how these particular programs and activities are discriminatory. The government simply asserts that defendant institutions receive some federal assistance and that the entirety of public higher education in Alabama is permeated with discrimination.⁶⁰ The United States argues that, taken together, the ten public colleges and universities along with the various state

⁵⁷ 110 Cong. Rec. 7064 (1964) (statement of Sen. Ribicoff). See also *Guardians Ass'n v. Civil Serv. Comm'n of City of New York*, 463 U.S. 582, 599, 103 S.Ct. 3221, 3231, 77 L.Ed.2d 866 (1983). Cf. Note, *Grove City College v. Bell and Program-Specificity: Narrowing the Scope of Federal Civil Rights Statutes*, 34 Cath.U.L.Rev. 1087, 1090 n. 7 (1985).

⁵⁸ *Guardians Ass'n*, 463 U.S. at 599, 103 S.Ct. at 3231; *United States Dept. of Transp. v. Paralyzed Veterans*, 477 U.S. 597, 106 S.Ct. 2705, 2711, 91 L.Ed.2d 494 (1986).

⁵⁹ 42 U.S.C. § 2000d (emphasis added).

⁶¹ The government's statement in the pretrial order is that "defendants are recipients of substantial amounts of federal financial assistance."

boards, commissions and officials named in the suit constitute a "program or activity receiving federal assistance." The government acknowledged at oral argument that it could cite no case law in support of its contention that independent public institutions could be merged into a single system for the purposes of title VI. According to the government, this case represented the first time that its systemic approach had reached adjudication. The United States argued that this new theory was demanded by the facts of this case—only by including often blameless individual institutions and actors can the State's violation be described and corrected.⁶¹

It appears to this court that the United States overstates the novelty of its attempt to satisfy title VI's requirement by defining the program as the collective "system" comprised of the various public colleges and universities, committees and officials. Rather, on closer examination, the government's argument can be seen as merely another variant on the broad "associative" theories that have been soundly repudiated by the Supreme Court and lower courts.

The United States Supreme Court decision in *Grove City College v. Bell*⁶² serves as the leading case on the program-

⁶¹ The United States opines:

The University of Alabama protests that there has never been a way it could bring itself into compliance with Title VI under the government's (and apparently, the court's) theory of liability. This assumes that each of the traditionally white schools has actually been found liable under Title VI. Our principal contention . . . has been that the State has caused a systemic violation. It has done so, at least in part, by favoring the traditionally white schools with money and programs. The schools are necessary parties because there is no way to describe the violation without implicating them, and no way to correct it that will fail to affect them.

Brief of United States, p. 68 n. 37 (citations omitted).

⁶² 465 U.S. 555, 104 S.Ct. 1211, 79 L.Ed.2d 516 (1984). This court

specific nature of title VI. The students at Grove City College received monies from federally funded student assistance programs. Based on the federal funding of Grove City students, the Department of Education claimed that the entire college must comply with title IX. Interpreting language identical to and directly modeled after that found in title VI,⁶³ the Supreme Court took a different tack. The Court agreed with the government that Grove City College could be considered to be "receiving Federal financial assistance" even though the funds were received by the students. The Supreme Court ruled, however, that Grove City's use of these funds did not trigger institution-wide coverage of the federal regulations. Only the specific program within the college receiving the federal assistance could be subjected to the statute. The Court rejected justifications for a broader reading of the "program or activity" requirement:

[T]he Court of Appeals' assumption that Title IX applies to programs receiving a larger share of a school's own limited resources as a result of federal assistance earmarked for use elsewhere within the institution is inconsistent with the program-specific nature of the statute. Most federal educational assistance has economic ripple effects throughout the aided institution, and it would be difficult, if not impossible, to deter-

is aware that the United States did not have guidance from Grove City when it filed its complaint in 1983.

⁶³ Title IX of the Education Amendments of 1972 and section 504 of the Rehabilitation Act of 1973 were modeled after title VI and contain identical language. The Supreme Court has assumed the meaning of this program-specific language to be the same for all three statutes. See, e.g., *School Board v. Arline*, — U.S. —, 107 S.Ct. 1123, 1126 & n. 2, 94 L.Ed.2d 307 (1987); *United States Dept. of Transp. v. Paralyzed Veterans*, 106 S.Ct. at 2708 & n. 4, 2714; *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 636, 104 S.Ct. 1248, 1255, 79 L.Ed.2d 568 (1984); *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 102 S.Ct. 1912, 1926, 72 L.Ed.2d 299 (1982); see also *Brown v. Sibley*, 650 F.2d 760, 767-68 (5th Cir. Unit A 1981).

mine which programs or activities derive such indirect benefits. Under the Court of Appeals' theory, an entire school would be subject to Title IX merely because one of its students received a small BEOG [Basic Educational Opportunity Grant] or because one of its departments received an earmarked federal grant. This result cannot be squared with Congress' intent.⁶⁴

Accordingly, the Supreme Court held that the only part of the college subject to the federal regulations was the college's own financial aid program.

Two terms later, the Supreme Court returned to the issue of what constituted a "program or activity receiving Federal financial assistance." In *United States Department of Transportation v. Paralyzed Veterans*,⁶⁵ the Supreme Court reaffirmed its intention to enforce strictly the program-specific nature of this language. Utilizing arguments that bear more than a passing resemblance to those of the government here, the Department of Transportation attempted to fuse airports and airlines into a single program or activity for the purposes of the statute.⁶⁶ The Supreme Court rejected the government's efforts to expand the regulations' coverage to broad concepts such as the "commercial aviation system" or the "interstate highway system." Given the United States' efforts to characterize "Alabama's public higher education system" as the relevant "program or activity," the reasoning of the *Paralyzed Veterans* Court is telling:

The Court of Appeals found that airports and airlines are "inextricably intertwined" and that the "in-

⁶⁴ 465 U.S. at 572-73; 104 S.Ct. at 1221.

⁶⁵ 477 U.S. 597, 106 S.Ct. 2705, 91 L.Ed.2d 494 (1986).

⁶⁶ The airlines were private corporations who received no federal funding. To bring the airlines under the sway of § 504, the Department of Transportation attempted to combine them with airports, since airports, receive substantial federal aid.

dissoluble nexus between them is the provision of commercial air transportation." For these reasons, the Court of Appeals concluded that commercial airlines are part of a federally assisted program of "commercial air transportation" because they make use of airports that accept federal funds, and because airports are "indispensable" to air travel.

* * *

The Court of Appeals' reliance on *Grove City* in support of its definition of the relevant program or activity is misplaced. In *Grove City*, despite the arguably "indissoluble nexus" among the various departments of a small college, we concluded that only the financial aid program could be subjected to Title IX. In any analogy between *Grove City* and this case, airport operators would be placed in the position of the College. It is readily apparent that our conclusion in *Grove City* that only a portion of the College was covered by Title IX cannot support the conclusion that commercial air transportation—a concept much larger than the airports—is the program or activity covered by § 504. The Court of Appeals' attempt to fuse airports and airlines into a single program or activity is unavailing. *It is by reference to the grant statute, and not to hypothetical collective concepts like commercial aviation or interstate highway transportation, that the relevant program or activity is determined.*⁶⁷

While the Supreme Court did not address the program-specific nature of these spending power statutes until these relatively recent decisions, this circuit has strictly enforced the "program or activity" requirement of title VI since its 1969 decision in *Board of Public Instruction v. Finch*.⁶⁸ *Finch* effectively disposes of the government's arguments

⁶⁷ 106 S.Ct. at 2713-14 (citations omitted) (emphasis added).

⁶⁸ 414 F.2d 1068 (5th Cir.1969).

here. In *Finch*, the Department of Health, Education and Welfare found the Taylor County School Board guilty of "seeking to perpetuate the dual school system through its construction program."⁶⁹ HEW's hearing examiner and Reviewing Authority found vestiges of discrimination and entered an order to terminate "any classes of Federal financial assistance" to the Taylor County School District "arising under any Act of Congress" administered by HEW, the National Science Foundation and the Department of the Interior.⁷⁰ Neither the hearing examiner or Reviewing Authority made any finding as to the individual grants awarded the Taylor County School system or the particular programs receiving federal money. The School Board went to court to stop the cut-off of funds and argued that HEW had failed to meet the "programmatic specificity" requirement of title VI. The Department responded by contending that "the term program in the statute does not refer to individual grant statutes, but to general categories such as . . . school programs."⁷¹

Our predecessor court sided with the Taylor County School Board. In a ruling later cited with approval by the Supreme Court,⁷² *Finch* held that HEW's attempt to characterize the entire school system as the relevant "program" was contrary to the legislative history of title VI. A review of the congressional debate showed that the leg-

⁶⁹ *Id.* at 1071.

⁷⁰ *Id.*

⁷¹ *Id.* at 1076.

⁷² In *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 102 S.Ct. 1912, 72 L.Ed.2d 299 (1982), the Supreme Court cited *Finch* with approval for the proposition that "language in §§ 601 and 602 of Title VI, virtually identical to that in §§ 901 and 902 and on which Title IX was modeled, has been interpreted as being program specific." *Id.* at 538, 102 S.Ct. at 1926. See also Flaccus, *Discrimination Legislation for the Handicapped: Much Ferment and the Erosion of Coverage*, 55 U.Cin.L.Rev. 81, 102-03 (1986).

islators expected the statute to be applied to narrowly focused grants, referring by name to programs such as the school lunch program, the agriculture extension program for home economics teachers, aid for vocational agriculture teaching, and aid to impacted school districts. The Finch court concluded that Congress intended title VI to apply "to particular grant statutes . . . , not to a collective concept known as a school program or a road program."⁷³ The court vacated the HEW order and remanded the case back to the agency for specific findings of fact as to which particular programs within the school district received federal monies and how each of these particular programs was being administered in a discriminatory manner or was being "so affected by discriminatory practices elsewhere in the school system that it thereby becomes discriminatory."⁷⁴

Countless other courts in this and other circuits have reached the same result and have refused to permit plaintiffs to use broad concepts such as "the University of Alabama system" to circumvent the program specificity requirement of title VI.⁷⁵ This focus on the particular pro-

⁷³ 414 F.2d at 1077 (emphasis in original). See also Note, *The Program-Specific Reach of Title IX*, 83 Colum.L.Rev. 1210, 1228-32 (1983).

⁷⁴ 414 F.2d at 1079.

⁷⁵ See, e.g., *Brown v. Sibley*, 650 F.2d 760, 769-70 (5th Cir. Unit A 1981) (federal funding of organization's counseling service and warehouse construction did not subject broom production shop to § 504); *Jacobson v. Delta Airlines, Inc.*, 742 F.2d 1202 (9th Cir.1984) (federal funding of airline's small community service did not subject carrier to § 504 of Rehabilitation Act), *cert. dismissed*, 471 U.S. 1062, 105 S.Ct. 2129, 85 L.Ed.2d 493 (1985); *Foss v. City of Chicago*, 640 F.Supp. 1088 (N.D.Ill.1986) (federal funding of Chicago Fire Department's first aid training for residents, emergency preparedness and disaster services and advanced education program did not trigger application of § 504 to entire department), *aff'd*, 817 F.2d 34 (7th Cir.1987); *Chaplin v. Consolidated Edison Co.*, 628 F.Supp. 143 (S.D.N.Y.1986) (federal funding of company's special trainee employees subjects only Specialized

gram receiving the federal funds has been especially strong in the higher education context. Courts have consistently held that federal aid to one area of a college or university, such as grants for academic research or new facilities or student work study, will not subject other areas of the institution to federal regulation.⁷⁶ The lack of precedential support for the government's systemic approach is not a product of the theory's innovativeness; it simply reflects the fact that this theory has been uniformly rejected by the federal courts.⁷⁷

Training Department to § 504, not entire company); *Bachman v. American Soc'y of Clinical Pathologists*, 577 F.Supp. 1257 (D.N.J.1983) (federal funding of organization's alcohol abuse activities does not subject organization's certification activities to federal regulation under § 504).

⁷⁶ See, e.g., *Doyle v. University of Alabama in Birmingham*, 680 F.2d 1323 (11th Cir.1982) (federal funding of some university programs does not subject program employing plaintiff to § 504 of Rehabilitation Act); *Bennett v. West Texas State University*, 799 F.2d 155 (5th Cir.1986) (federal funding of student service fees, work study program and federal building subsidies does not subject college's athletic program to title IX); *O'Connor v. Peru State College*, 781 F.2d 632 (8th Cir.1986) (federal funding of college's academic research and instruction did not subject college's athletic program to title IX); *Rice v. President and Fellows of Harvard College*, 663 F.2d 336 (1st Cir.1981) (federal funding of work study program did not subject the entire law school to title IX), *cert. denied*, 456 U.S. 928, 102 S.Ct. 1976, 72 L.Ed.2d 444 (1982); *Mabry v. State Bd. for Community Colleges*, 597 F.Supp. 1235 (D.Col.1984) (federal funding of various college activities did not subject programs taught by plaintiff to title IX where none of these programs benefited from federal aid), *aff'd on other grounds*, 813 F.2d 311 (10th Cir.1987).

⁷⁷ Appellees attempt to distinguish the line of cases rejecting a systemic approach by arguing that these cases dealt with the termination of funds. Our review of title VI's legislative history reveals no intention to apply different standards to suits to achieve compliance and those to terminate funds. Nor can we perceive any reason why the program specificity requirement of title VI should be different for compliance actions and termination actions. Both types of cases are brought pursuant to title VI, and the same program specific language should apply regardless of the remedy sought.

Title VI mandates a more rigorous analysis of the federal assistance received by defendants than was undertaken below. Under the United States' theory of the case, it was sufficient that some defendants received some federal assistance. The United States presented no evidence, and the trial court made no findings, detailing which programs and activities within these defendant institutions received federal funding. Because of this failure to identify the particular federally assisted programs being affected, the United States could not show how the actions of defendants rendered these programs discriminatory. Such detailed showings are necessary to satisfy the program specificity requirement of title VI. We thus hold that the action of the United States cannot stand as presently constituted, and its complaint and proof must be redrawn to make the requisite showings of which particular programs or activities received federal funding and how these programs were discriminatory.

The program specificity requirement is not some pointless technical exercise. Even if the United States were ultimately able to sue many of the same defendants raising the same basic claims of discrimination,⁷⁸ a focus on how each program is discriminatory will go far to clarify this complex and often times confusing litigation. The program specificity requirement also serves to protect innocent beneficiaries of programs *not* tainted by discriminatory practices. As this court noted in *Finch*,

If the funds provided by the grant are administered in a discriminatory manner, or if they support a pro-

⁷⁸ For example, if the United States can show that a defendant institution received non-earmarked general revenue grants, the relevant "program" may include all activities receiving funds out of that general account. See *Arline v. School Bd.*, 772 F.2d 759, 763 (11th Cir.1985), *aff'd*, ___ U.S. ___, 107 S.Ct. 1123, 94 L.Ed.2d 307 (1987); Note, *The Program-Specific Reach of Title IX*, 83 Colum.L.Rev. 1210, 1237-40 (1983).

gram which is infected by a discriminatory environment, then termination of such funds is proper. But there will also be cases from time to time where a particular program, within a state, within a county, within a district, even within a school (in short, within a "political entity or part thereof"), is effectively insulated from otherwise unlawful activities. Congress did not intend that such a program suffer for the sins of others. HEW was denied the right to condemn programs by association. The statute prescribes a policy of disassociation of programs in the fact finding process. Each must be considered on its own merits to determine whether or not it is in compliance with the Act. In this way the Act is shielded from a vindictive application. Schools and programs are not condemned enmasse or in gross, with the good and the bad condemned together, but the termination power reaches only those programs which would utilize federal money for unconstitutional ends. Under this procedure each program receives its own "day in court."⁷⁹

D. Equal Protection Claim

The Knight intervenors also assert a claim under title VI. Since the Knight intervenors adopted the same systemic approach as the United States, their title VI claim falls to the analysis set out above. In addition, however, the Knight intervenors in their complaint allege that their rights under the equal protection clause of the fourteenth amendment to the United States Constitution have been violated by defendants and that they therefore seek relief under 42 U.S.C. § 1983. The Knight intervenors are plainly entitled to bring a § 1983 action charging that they suffered discrimination in violation of the equal protection clause due to unequal and segregative public higher edu-

⁷⁹ 414 F.2d at 1078.

cation in the Montgomery area.⁸⁰ Defendants' objections to the Knight intervenors' standing are frivolous. Contrary to defendants' contentions, the Knight intervenors are not asserting the institutional rights of ASU. The Knight intervenors are asserting their own rights as individuals who suffered racial discrimination by virtue of attending or working at an unequal, segregative institution of public higher education. The Knight intervenors are the proper party to bring this claim.⁸¹

IV. CONCLUSION

That all may drink with confidence from their waters, the rivers of justice must not only be clean and pure, they must appear so to all reasonable men and women. Under the particular facts before us, the prior activities of the district judge cloud the court's impartiality and diminish its moral force. Accordingly, we REVERSE the judgment of the District Court and REMAND to the Chief Judge of the Northern District of Alabama with instructions (1) that the complaint of the United States be dismissed without prejudice, (2) that the title VI claim of the Knight intervenors be dismissed without prejudice, and (3) that the remaining claims be assigned to himself or another judge for a new trial or other proceedings⁸² not inconsistent with this opinion.

⁸⁰ See *United States v. Alabama*, 791 F.2d 1450 (11th Cir.1986), cert. denied, ___ U.S. ___, 107 S.Ct. 1287, 94 L.Ed.2d 144 (1987).

⁸¹ This court, of course, expresses no opinion as to the correctness of the class certification, the res judicata effect of *Alabama State Teachers Ass'n v. Alabama Pub. School and College Auth.*, 289 F.Supp. 784 (M.D.Ala.1968), *aff'd per curiam*, 393 U.S. 400, 89 S.Ct. 681, 21 L.Ed.2d 631 (1969), or other rulings concerning the Knight intervenors' claim. We simply hold that the Knight intervenors have standing to bring this action.

⁸² In the event that no amended title VI claim withstands defendants' motion to dismiss, the district judge may consider whether the Knight equal protection claim can better be resolved in the Middle District of Alabama.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

No. CV 83-C-1676-S.

UNITED STATES of America

Plaintiff,

v.

The STATE OF ALABAMA; et al.,

Defendants.

[Filed March 16, 1984]

OPINION ON MOTIONS FOR RECUSAL

DYER, Senior Circuit Judge, Sitting by Designation.

The United States instituted this action against the State of Alabama and its state institutions of higher learning, including Auburn University, alleging that the defendants are maintaining and perpetuating racial segregation. The case was routinely and randomly assigned to Judge U.W. Clemon. Auburn University and Wayne Teague, the State Education Commissioner, filed motions to disqualify Judge Clemon pursuant to 28 U.S.C. §§ 144 and 455.

Judge Clemon did not reach the sufficiency of the affidavits' averments but denied the motions because the affidavits were executed by counsel instead of the parties. Auburn and Teague then filed a motion for reconsideration

accompanied by affidavits properly executed by the parties. Judge Clemon denied the motion on the ground that § 144 permits a party to file only one affidavit in any case.

After a hearing, Judge Clemon, by opinion, denied the motion based upon § 455. On petition for Mandamus by Auburn and Teague, the Court of Appeals, without expressing any opinion on the ultimate question of disqualification, remanded the case "with directions that another judge be assigned to hear the recusal proceedings."¹

The identical affidavits filed by Auburn and Teague generally allege three grounds for disqualification which may be summarized as follows:

1. Judge Clemon's minor children are possible members of a class of black school children seeking to intervene, suggesting the possibility of the appearance of a personal interest in the outcome of the case.
2. While in private practice Judge Clemon appeared as attorney of record for individual plaintiffs in a statewide desegregation case which may have provided him with access to factual matters disputed in the present case.
3. Judge Clemon's prior association with former Senator Stewart, who is now a member of the firm representing Alabama A & M in this action, creates the "possibility of the appearance of personal bias."

For the reasons discussed hereafter, the averments of the affidavits are insufficient, as a matter of law, to require disqualification under § 144. The affidavits, together with the evidence presented, also fail to support disqualification under § 455. Accordingly, the motions are denied

¹ For the reasons explicated at the hearing on the motions this court held that it would hear, consider and decide the question of disqualification under both 28 U.S.C. §§ 144 and 455.

and the case is reassigned to Judge Clemon for disposition of the case on the merits.

THE LEGAL SUFFICIENCY OF DEFENDANT'S AFFIDAVITS UNDER 28 U.S.C. § 144.

Section 144² requires a district judge's recusal when a party files a "timely and sufficient" affidavit alleging personal bias or prejudice against that party or in favor of an adverse party. *Parrish v. Board of Commissioners*, 524 F.2d 98, 100 (5th Cir.1975, *en banc*), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed.2d 188 (1976). An affidavit in this circumstance is legally sufficient only if it sets forth facts and reasons for the party's belief "which give fair support to the charge of a bent of mind that may impede impartiality of judgment." *Parrish*, 524 F.2d at 100 (quoting *Berger v. United States*, 255 U.S. 22, 23 (1921)). Further, the judge must assume the truth of the matters alleged and limit his determination to the legal sufficiency of the averments. See *Berger v. United States*, 255 U.S. 22, 41 S.Ct. 230, 65 L.Ed. 481; *Davis v. Board of School Commissioners*, 517 F.2d 1044, 1051 (5th Cir.1975), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed.2d 188 (1976).

Since § 144 requires recusal merely on the basis of a party's belief that a judge is biased, without questioning the veracity of the affiant's allegations, it invites abuse.

² Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith. 28 U.S.C. § 144 (1976)

Thus, the statutory standards for compliance are strictly construed. In *United States v. Haldeman*, the court detailed the stringent requirements for legal sufficiency under § 144:

Section 144 specifies that "[t]he affidavit supporting a motion thereunder 'shall state the facts and the reasons for the belief that bias or prejudice exists,' " and it does so for the best of reasons. This provision, like the accompanying mandate that counsel of record certify that the affidavit is made in good faith, was designed to guard against groundless claims and the impositions they would inflict on the judicial process. To achieve that end, the courts have consistently held that the affidavit must meet exacting standards. It must be strictly construed; it must be definite as to time, place, persons and circumstances. Assertions merely of a conclusionary nature are not enough, nor are opinions or rumors. And the affidavit "must give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment."

559 F.2d 31,134 (D.C.Cir.1976), *cert. denied*, 431 U.S. 933, 97 S.Ct. 2641, 53 L.Ed.2d 250 (1977). (footnotes omitted).

In addition, the strength of the averments is tempered by a presumption of the judge's impartiality. "Since a judge is presumed impartial, the party seeking recusal has a substantial burden to overcome the presumption with factual allegations of personal bias stemming from extra-judicial source." *United States v. Baskes*, 687 F.2d 165, 170 (7th Cir.1981).

To determine whether disqualification is required under § 144, the allegations contained in the affidavits of Auburn and Teague must be scrutinized. If they support "the charge of a bent of mind that may prevent or impede impartiality of judgment" on any of the three grounds raised by the affidavits, recusal is required.

An analysis of the sufficiency of the allegations must begin with the test adopted by the Fifth Circuit in *Parrish*. There the court, quoting *United States v. Thompson*, set forth the three requirements for a legally sufficient affidavit as follows:

"In an affidavit of bias, the affiant has the burden of making a three-fold showing:

1. The facts must be material and stated with particularity;
2. The facts must be such that, if true they would convince a reasonable man that a bias exists;
3. The facts must show the bias is personal, as opposed to judicial, in nature."

524 F.2d at 100 (quoting *United States v. Thompson*, 483 F.2d 527, 528 (3d Cir.1973).

Application of the *Parrish* test to the present affidavits demonstrates their failure to state material facts with sufficient particularity to convince a reasonable man that a personal bias exists. The affidavits begin by stating that "the judge before whom the cause is pending has a personal bias or prejudice either against said defendant or in favor of parties to the action whose interests may be adverse to such defendant." This initial conclusory allegation is "general or impersonal" at best and is insufficient to allege the requisite personal bias for disqualification. *See, Parrish*, 524 F.2d at 101. It is unclear what is alleged: bias against Auburn and Teague or in favor of the plaintiff. The confusion persists through the affidavits. The remaining averments generally allege three grounds for disqualification.

Judge Clemon's Involvement in *Lee v. Macon County Board of Education*.³

Lee v. Macon was a massive school desegregation case instituted against the State of Alabama in 1970. It involved ninety-nine school systems, all of the trade schools and junior colleges, plus four of the four-year institutions named as defendants in the present case which were at one time subject to the control of the State Board of Education. The averments detailing Judge Clemon's involvement in *Lee v. Macon* may be summarized as follows:

1. Judge Clemon, while in private practice appeared as attorney of record for individual plaintiffs.
2. *Lee v. Macon* included claims under Title VI of the Civil Rights Act of 1964 against institutions of higher learning in Alabama involving claims of racial discrimination during periods of time relevant to the present case.
3. Judge Clemon, and the law firm that he was associated with, received copies of all pleadings, paid a filing fee for a Notice of Appeal, and provided other assistance in securing the appeal.
4. Judge Clemon was involved in the case, as an attorney, as early as 1971.
5. Certain state colleges named as defendants in *Lee v. Macon* are named as defendants in this action. Jurisdiction over these defendants was transferred to the Northern District of Alabama on May 30, 1972.
6. Since the transfer, the court file relating to these defendants "are not closed, but have vitality and are currently assigned to various judges for supervision of work."

³ Civil Action No. 70-251, N.D.Ala.

7. From 1967 through 1968 Judge Clemon, while a law student, was employed by the NAACP Legal Defense and Education Fund, a leading force in the *Lee v. Macon* litigation in the Middle District of Alabama.
8. As a result of his role as attorney of record in *Lee v. Macon* and his employment by the Defense Fund, Judge Clemon had access to disputed factual matters allegedly relevant in the case at bar concerning conduct by institutions of higher learning in the State of Alabama, including many of the present defendants.

These allegations present a general claim lacking in the particularity necessary, under the *Parrish* test, to convince a reasonable man that bias exists. The allegations concerning Judge Clemon's involvement in *Lee v. Macon* are limited to appearing as attorney of record, paying of a filing fee and assisting in obtaining an appeal. The affidavits fail to state for which plaintiffs Judge Clemon was "attorney of record". Given the magnitude of the case, it is likely as not that the interests of plaintiffs represented by Judge Clemon were completely isolated from any claim which affected institutions of higher learning, including Auburn. Auburn and Teague claim only that "the action [*Lee v. Macon*] included claims of racial discrimination against institutions of higher learning in the State of Alabama." *Lee v. Macon* was not limited to claims against institutions of higher learning and the affidavits fail to allege any facts which would connect Judge Clemon to that aspect of the case.

The affidavits do not demonstrate a personal bias on the part of Judge Clemon. Rather, they allege that he had access to disputed facts relevant to the present case. The affidavits do not indicate what facts Judge Clemon had access to or how they are relevant to the present case. They do not even suggest enough details to indicate that

the facts that Judge Clemon had access to are of the nature that would affect his impartiality or cause a personal bias. The affiants merely allege that Judge Clemon had some contact with an unidentified aspect of the case through his representation of individual plaintiffs and that prior to the filing of the action, while Judge Clemon was a law student, he was employed by an agency that was a motivating factor in bringing the action. These allegations do not support or even suggest the personal bias required. Affiants' reliance on *United States v. Grinnell Corp.*, 384 U.S. 563, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966) is misplaced.

Grinnell simply precludes disqualification where the bias alleged is not extrajudicial. While the bias alleged is admittedly extrajudicial in the present case, it is insufficient to establish a personal bias under the *Parrish* test. At most, the allegations support only the inference that Judge Clemon's background as a civil rights attorney and his race cause him to be inherently biased and incapable of rendering an impartial decision in a school desegregation case.

A claim that is essentially an allegation based on the judge's background and which states no specific facts that would suggest he would be anything but impartial in deciding the case before him is insufficient. *Parrish*, 524 F.2d at 101. In *Parrish*, the trial judge was not disqualified from a racial discrimination case even though he had been president of a bar association whose charter barred black members. The court in *Parrish* held that the factual base alleged for recusal did not raise an inference of personal bias or prejudice. *Id.* The fact that Judge Clemon has represented plaintiffs in racial discrimination actions provides no additional support for the claim of bias. The facts set forth in the affidavits

"... show no personal bias on the part of the judge against any of the defendants, but, at most, zeal for

upholding the rights of Negroes under the Constitution and indignation that attempts should be made to deny them their rights. A judge cannot be disqualified merely because he believes in upholding the law, even though he says so with vehemence."

Baskin v. Brown, 174 F.2d 391, 394 (4th Cir.1949).

The question underlying the allegations in the present affidavits is whether a black judge should be disqualified *per se* from adjudicating cases involving claims of racial discrimination. *Pennsylvania v. Local Union 542*, 388 F.Supp. 155, 165 (E.D.Pa.1974). It is clear that a judge's color, sex or religion does not constitute bias in favor of that color, sex or religion. See *Menora v. Illinois High School Assoc.*, 527 F.Supp. 632 (N.D.Ill.1981); *Blank v. Sullivan and Cromwell*, 418 F.Supp. 1, 4 (S.D.N.Y.1975). In *Pennsylvania v. Local Union 542*, Judge Higginbotham denied a motion seeking his recusal from an employment discrimination case on the ground that he exercised a "significant role as a spokesman, scholar and active supporter of the advancement of the causes of integration." 388 F.Supp. at 157. Judge Higginbotham noted that requiring black judges to recuse themselves from racial discrimination cases would result in a double standard within the federal judiciary. *Id.* at 165. The allegations of the present affidavits only illustrate that Judge Clemon, like Judge Higginbotham, is an active supporter of "the cause of integration" and fail to show a personal bias against Auburn, Teague or any of the present defendants.

Judge Clemon's Children as Possible Class Members.

The affidavits allege that Judge Clemon has two minor children who are members of a putative class seeking to intervene in this action. The class includes students matriculating in institutions located in the State of Alabama and presently studying in grades commonly known as elementary or high school. The defendant suggests "the possibility of the appearance of a personal interest in the

outcome of the action" created by Judge Clemon's failure to disqualify himself under the circumstances.

As previously noted, § 144 plainly requires an allegation of personal bias, not the appearance of a personal bias or personal interest. The fact that Judge Clemon has two children of school age in the State of Alabama who may indirectly benefit from a ruling adverse to the defendants in this action should not convince a "reasonable man that a bias exists." *Parrish*, 524 F.2d at 100. The interests claimed are too tenuous and remote. There is no allegation that Judge Clemon's children intend to enroll in any of the defendant institutions of higher learning. The class of intervenors, not yet certified, includes nearly every black child in Alabama. Defendants would suggest then that every black judge, with minor children in the state, would be precluded from presiding in a school desegregation case. This reasoning once again suggests only an inference of inherent bias based upon the judge's race.

Judge Clemon's Prior Association with Former Senator Stewart.

The final ground for disqualification raised in the affidavits allege that Judge Clemon's relationship with former Senator Stewart, who is now a member of the firm representing Alabama A & M in this action, creates the "possibility of the appearance of personal bias." This allegation fails under § 144 because it only alleges the appearance and not the existence of personal bias as required under the *Parrish* test. The facts contained in the averment do not otherwise support the allegation.

Auburn and Teague allege that during his tenure as a United States Senator from Alabama, Mr. Stewart sponsored the nomination of Judge Clemon to the Federal Bench. They also state that "Mr. Stewart was so actively involved in Judge Clemon's nomination to the Bench that the American Bar Association criticized Judge Clemon" for making a \$500 political contribution to Mr. Stewart.

Although Alabama A & M was originally a defendant in this action, it now seeks to be realigned as a plaintiff. Affiants assert that the primary factor motivating the request to be realigned is that as a plaintiff, Alabama A & M would have attorney's fees available as a form of relief. The affidavits further allege that in formulating the appropriate award of attorney's fees, Judge Clemon would be required to consider the reputation and quality of legal work performed by former Senator Stewart's firm.

Section 144 requires recusal when personal bias or prejudice against that *party* or in favor of an adverse *party* is alleged. See, *Parrish*, 524 F.2d 98. A party as used in § 144 does not include counsel as such. *Davis v. Board of School Commissioners*, 517 F.2d 1044 (5th Cir.1975), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed.2d 188 (1976). In *Davis*, intervenors filed affidavits alleging bias based upon a controversy between the judge and the affiants' attorney. The court found the affidavits legally insufficient because there was no basis for imputing bias against the attorney to the affiants. *Id.* at 1051.

In sum, this court finds the averments of the affidavits, taken as true, are facially insufficient to show personal bias or prejudice of Judge Clemon.

We now turn to the motions for recusal of Judge Clemon under § 455.⁴ Auburn bases its § 455⁵ claims on the three

⁴ The motions of Auburn and Teague for recusal under this section are identical. For the sake of brevity we refer simply to Auburn.

⁵ § 455 of 28 U.S.C. (1976) provides in pertinent part:

(a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts con-

grounds raised in its § 144 affidavit and on several additional grounds. Auburn supplements its *Lee v. Macon* claim by pointing out two other instances where Judge Clemon, while in private practice was involved in an adversary proceeding involving allegations of racial discrimination in higher education. Auburn also contends that public statements made by Judge Clemon concerning the recusal proceedings demonstrate "a personal bias concerning a party", and that the judge's "impartiality might reasonably be questioned" as a result of these statements, together with publicity surrounding the recusal efforts. Each of these assertions, discussed hereafter individually, fail to support an independent basis for disqualification

cerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

under § 455. The fact that multiple grounds have been raised fails to buttress the claim. As Judge Arnow stated in *Miller Industries v. Caterpillar Tractor Co.*:

In determining the necessity for disqualification, all circumstances bearing upon it should be considered. But that does not mean that various circumstances, each insufficient standing alone, mandates sufficiency in total. Under the factual situation here presented, holding that these various circumstances in combination require disqualification would be tantamount to holding that adding several zeros together would produce something more than zero.

516 F.Supp. 84, 87 (S.D.Ala.1980).

Judge Clemon's Participation in Adversary Proceedings Involving Charges of Racial Discrimination in the State's Education System.

In addition to *Lee v. Macon*, Auburn notes Judge Clemon's involvement in the *Afro-American Association of the University of Alabama v. Bryant*, CA. No. 69-422 (N.D.Ala.), and *In re Alabama Educational Television Commission*, Docket No. 20276. Auburn contends that Judge Clemon's involvement in each of these cases provides an independent basis for disqualification under § 455.

Section 455(b)(1) requires disqualification where a judge "has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding." Section 455, unlike § 144, does not require the judge to accept all allegations as true. *Phillips v. Joint Legislative Committee*, 637 F.2d 1014, 1019 n. 6 (5th Cir.1981), *cert. denied* 456 U.S. 960, 102 S.Ct. 2035, 72 L.Ed.2d 483 (1982). Nevertheless, the standard under § 455(a) is stricter than § 144. *Id.* While § 144 requires allegations sufficient to convince a reasonable man that bias exists, under § 455(a) the allegations must show only that a reasonable person would harbor doubts about the

judge's impartiality. *Id.* In determining when the appearance of impropriety might occur under § 455(a), the reasonable person test is used. *Huff v. Standard Life Insurance Co.*, 683 F.2d 1363 (11th Cir.1982). "The reasonable person is presumed to possess knowledge of all the circumstances" under § 455. *Id.* Consideration of all the facts and circumstances surrounding each of these claims dispells all reasonable doubts as to Judge Clemon's impartiality.

The facts demonstrate that the *Lee v. Macon* case is not the same "matter in controversy" under § 455(b)(2) and that Judge Clemon did not have access to disputed evidentiary facts under § 455(b)(1). Auburn argues that the claim of plaintiff in the present action that the State of Alabama has conducted a dual system of higher education since 1953 makes the conduct of other defendants, not Auburn, who were named as defendants in *Lee v. Macon* relevant to the present case. Auburn contends that by representing plaintiffs in *Lee v. Macon*, Judge Clemon was dealing as attorney with some of the facts that are in dispute now. This claim is without foundation.

Judge Clemon's testimony reveals that he became involved in parts of *Lee v. Macon* only after it was fragmented into nearly 100 separate actions and divided among various districts and divisions in the state. At that point *Lee v. Macon* was logically and legally many different cases. Judge Clemon stated that he never participated in aspects of the case involving higher education. His involvement was limited to the public school systems of Sumnter County and the City of Anniston. Each of the separate school systems included in *Lee v. Macon* have been treated separately since the transfer.

When the college and university aspect of *Lee v. Macon* was transferred to the Northern District of Alabama, the only present defendant remaining under the control of the State Board of Education was Alabama A & M University.

Since the transfer in 1972, the only action involving the institutions of higher learning was the severance of a complaint in intervention against Livingston University.

Auburn relies on *W. Clay Jackson v. Greyhound Leasing*, 467 F.Supp. 801 (D.P.R.1979), for the proposition that access to information requires recusal under § 455. In *Clay*, the trial judge admitted that a reasonable doubt had been created in his own mind that facts may have come into his knowledge while acting as labor counsel to one of the parties. *Id.* at 803. Clay may be distinguished from the present case because Judge Clemon has expressly disavowed any knowledge of facts in *Lee v. Macon* pertaining to institutions of higher learning.

In *Laird v. Tatum*, 409 U.S. 824, 829, 93 S.Ct. 7, 10, 34 L.Ed.2d 50 (1972), Justice Rehnquist refused to recuse himself although he had been a witness for the Justice Department in Senate hearings inquiring into the same subject matter. In so doing, he noted that none of the Supreme Court Justices since 1911 had followed a practice of recusing themselves in cases involving points of law with respect to which they had expressed an opinion or formulated a policy prior to ascending the Bench. *Id.* at 831, 93 S.Ct. at 11.

Even applying the objective standard of § 455(a), a reasonable man knowing all of the circumstances would not believe Judge Clemon's involvement in *Lee v. Macon* could have provided him with personal knowledge of disputed facts or otherwise create a doubt as to his ability to remain impartial. The allegations concerning Clemon's employment as a librarian at the NAACP Legal Defense Fund add no weight to Auburn's argument. Judge Clemon has denied acquiring any knowledge of any facts involving *Lee v. Macon* while so employed. It would seem unlikely that Judge Clemon's employment as a law student librarian would cause a reasonable person to "harbor a doubt as to the Judge's impartiality." *Potashnick v. Port City Con-*

struction Co., 609 F.2d 1101, 1111 (5th Cir.1980), cert. denied, 449 U.S. 820, 101 S.Ct. 78, 66 L.Ed.2d 22 (1980).

According to the Report of the House Judiciary Committee, the 1974 amendments to § 455 were designed to bring the statutory grounds for disqualification into conformity with Canon 3 of the Code of Judicial Conduct which requires a judge to disqualify himself if there is a reasonable factual basis for doubting the judge's impartiality. H.R.Rep. No. 93-1453, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S.Code Cong. & Admin.News, pp. 6351, 6352-55. The report noted, however, that "[D]isqualification must have a *reasonable* basis. Nothing in this proposed legislation should be read to warrant the transformation of a litigant's fear that a judge may decide a question against him into a 'reasonable fear' that the judge will not be impartial." *Id.*

Judge Clemon's involvement in *Lee v. Macon*, as well as the other noted adversary proceedings, does not evidence any basis for imputing a lack of impartiality or appearance of bias on the part of Judge Clemon, but rather, indicates the possibility of a particular judicial leaning. Allegations of such predispositions based upon background alone is insufficient to support disqualification. See *Phillips*, 637 F.2d at 1021; *Blank v. Sullivan and Cromwell*, 418 F.Supp. at 4; *Pennsylvania v. Local Union 452, International Union of Operating Engineers*, 388 F.Supp. at 159.

The Afro-American Claim

Auburn amended its Motion to Disqualify to include the allegation that Judge Clemon's representation of plaintiffs in the *Afro-American Association of the University of Alabama v. Bryant* requires disqualification under § 455. The *Afro-American* action was filed on July 2, 1969 and was dismissed with prejudice on May 10, 1971. The complaint alleged that the University of Alabama was failing to re-

cruit black athletes and was failing to award them scholarships. The plaintiffs charged violation of equal protection under the Fourteenth Amendment and requested injunctive relief to require the university to recruit black athletes and provide them with financial assistance. In addition, an injunction was sought under Title VI of the Civil Rights Act of 1964 against the Secretary of HEW to require him to cut off federal funds if the alleged racially discriminatory practices did not cease.

On March 4, 1970, the court dismissed the Secretary of HEW and the Title VI claim for failure to exhaust administrative remedies. The case settled before trial.

Auburn claims here, as in *Lee v. Macon* that the *Afro-American* case is the same matter in controversy under § 455(b)(2); that Judge Clemon's participation in *Afro-American* provided him with access to disputed evidentiary facts under § 455(b)(1) and that his involvement in the case would cause his impartiality to be reasonably questioned under § 455(a).

The *Afro-American* case and the present case do have the common thread of racial discrimination claims. Nevertheless, the cases, though similar are not the same for purposes of § 455. The *Afro-American* claim presented questions of the denial of equal protection to black athletes by Auburn's policies and practices as they existed thirteen years ago. In contrast the present action challenges the vestiges of *de jure* segregation currently existing in Alabama's institutions of higher learning. Both the legal theories and the relevant facts pertaining to the cases are different. To hold that the actions are the same "matter in controversy" under § 455 would suggest that Judge Clemon is precluded from presiding over any kind of race discrimination claim against Auburn or any of the defendant institutions. Such reasoning overreaches the intent of § 455.

Auburn also claims, under § 455(b)(1) that Judge Clemon, as a result of his role in *Afro-American*, acquired knowledge of disputed evidentiary facts concerning the present proceeding. Auburn has not particularized any such facts and their knowledge cannot be inferred under the circumstances.

The lapse of time, dissimilarity in the claims and lack of overlap in disputed facts makes it unreasonable to conclude that Judge Clemon's impartiality might be questioned. See *School District of Kansas City v. Missouri*, 438 F.Supp. 830 (W.D.Mo.1977).

The FCC Proceedings

Auburn characterizes this claim as the third instance of Judge Clemon's participation in an adversary proceeding involving charges of racial discrimination in the State's Educational system during the relevant time period. This characterization is misleading. Judge Clemon acted as attorney, and later as Chairman of the Board of the Alabama Citizens for Responsive Television (ACRPT). The organization proposed transfers from Auburn University and the University of Alabama to traditionally black colleges, public and private. The Alabama Educational Television Commission (AETC), a state agency, was empowered to control use of channels reserved by the FCC for educational use, to designate locations of stations, to utilize such channels, and to contract with persons including educational institutions for operation of such stations.

In 1975, the FCC found the AETC guilty of a racially discriminatory policy in programming but permitted it to apply for a new license. The actions cited by Auburn relate to ACRPT's competitive petition. Testimony of Wilbur H. Hinton, manager of AECT reveals that AECT is a separate entity from the universities. The relationship between AECT and Auburn is purely contractual. Alabama A & M and other universities have production centers that

produce programs for the network. Any racial discrimination charges would thus relate to AECT's activities in programming and purchasing and would have no bearing on university activities.

This claim fails to support any basis for disqualification under § 455.

The Stewart Claim

This claim fails under § 455 for the same reasons as stated under § 144. Sections 455 and 144 are to be construed *in pari materia*. *Davis v. Board of School Commissioners*, 517 F.2d 1044, 1052 (5th Cir.1975), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed.2d 188 (1976). Thus, in passing on the issue of disqualification, the basis of conduct which shows bias or prejudice or lack of impartiality must focus on the party rather than counsel. *Id.* Auburn has not demonstrated any facts which would lead a reasonable man to conclude that Judge Clemon's association with former Senator Stewart will affect his ability to remain impartial. Unlike the judge in *Potashnick v. Port City Construction Co.*, 609 F.2d 1101 (5th Cir.1980), Judge Clemon did not participate with Mr. Stewart in any business ventures; he was not personally represented by Mr. Stewart as an attorney and he has not maintained an ongoing social relationship with Mr. Stewart. *See, Huff v. Standard Life Insurance Co.*, 683 F.2d 1363 (11th Cir.1982).

Judge Clemon's Children

Auburn alleges that Judge Clemon's children, as potential class members, are parties to the present proceedings thus mandating disqualification under § 455(b)(5) and that the children have a substantial interest in the litigation requiring disqualification under § 455(b)(4). Once again, this claim is too tenuous and remote. The class defined sweeps so broadly that it places all judges with school-age

children in Alabama in either a class or a counter-class. To employ Auburn's reasoning would require disqualification of all judges with such school-age children. The interests claimed to be affected are uncertain and contingent upon Judge Clemon's children choosing to attend one of the defendant institutions at some unknown date in the future. These interests are clearly not the substantial interests contemplated under § 455.

Publicity Surrounding the Recusal Proceedings.

As the final ground for disqualification raised under § 455, Auburn alleges that Judge Clemon has a personal bias or prejudice concerning a party as demonstrated by statements made by Judge Clemon to various newspapers concerning his disqualification by Judge Grooms.⁶ Auburn also contends that the statements, together with the publicity surrounding the recusal proceedings, might cause a reasonable person to question Judge Clemon's impartiality under § 455(a).

Judge Clemon's statements to the press do not demonstrate any personal bias or prejudice concerning a party. Clemon's statements are limited to his reasons for denying the disqualification motion and his disagreement with Judge Groom's contrary ruling. Since the statements do not mention the parties, they cannot reflect a personal bias concerning a party. As noted, previously, the standard is the same under §§ 144 and 455. To support an allegation of bias the prejudice shown must be personal concerning a party. *Davis*, 517 F.2d 1052.

Publicity alone cannot create a reasonable doubt as to the judge's impartiality under § 455(a). In *In re United*

⁶ Upon remand, the Chief Judge of the Northern District of Alabama assigned this matter to Senior Judge H.H. Grooms. After a hearing, Judge Grooms issued an opinion and order requiring that Judge Clemon be disqualified. On motion for rehearing, Judge Grooms vacated his order and recused himself from any further proceedings.

States, 666 F.2d 690, 695 (1st Cir.1981), the court faced with a similar publicity problem concerning recusal proceedings stated that "to the extent the doubts were created by representatives of the press shown to be not grounded in fact, they cannot require disqualification." The mere fact that the issue of disqualification of Judge Clemon has drawn the attention of the media, resulting in extensive coverage, is not, in itself, a good reason to reassign this case. The adoption of this view would lead to judicial abandonment of responsibility for the purity of the judicial process and ultimately undermine the independence and integrity of the courts.

The motions of Auburn and Teague to disqualify Judge Clemon pursuant to §§ 144 and 455 are severally denied.

APPENDIX C

UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DISTRICT

Civ. A. No. 83-C-1676-S.

UNITED STATES of America,
Plaintiff,
JOHN F. KNIGHT, JR., et al., individually and on behalf of
others similarly situated,
Plaintiffs-Intervenors,
BOARD OF TRUSTEES OF ALABAMA STATE UNIVERSITY and
ALABAMA A & M UNIVERSITY,
Realigned Plaintiffs,

v.

The STATE OF ALABAMA; George C. Wallace, Governor of
the State of Alabama; the Alabama State Board of Edu-
cation; Wayne Teague, State Superintendent of Education;
Auburn University, a public corporation; Jacksonville State
University, a public corporation; Livingston University, a
public corporation; Troy State University, a public cor-
poration; the University of Montevallo, a public corpora-
tion; the Board of Trustees for the University of Alabama,
a public corporation; the University of North Alabama, a
public corporation; the University of South Alabama, a
public corporation; the Alabama Commission on Higher
Education; and the Alabama Public School and College
Authority,

Defendants.

[Filed December 7, 1985]
[Entered December 9, 1985]

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MEMORANDUM OF OPINION

CLEMON, District Judge.

Introduction

The merits of this case involve two issues: whether the State of Alabama operated a racially dual system of higher education, and, if so, whether the vestiges of the dual system have now been eliminated. In 1983, the United States initiated this action under 42 U.S.C. § 2000d, d-1, ("Title VI") and the Fourteenth Amendment to the United States Constitution against the State of Alabama, its publicly supported institutions of higher learning and related agencies and officials. Two defendants, Alabama A & M University ("A & M") and Alabama State University ("ASU"), were granted leave to realign themselves as plaintiffs.

Since the issues in *Knight v. James*, 514 F.Supp. 567 (M.D.Ala.1981), are subsumed in this case, the certified class in *Knight* was permitted to intervene herein and to assert its claims under Title VI and 42 U.S.C. § 1983.

After protracted, voluminous and often unnecessary discovery, the trial of the case commenced in, and consumed the month of July, 1985.

Based on the evidence adduced at trial, and for the reasons which follow, the court concludes that the State of Alabama has indeed operated a dual system of higher education; that in certain respects, the dual system yet exists; and that in other respects, the "root and branches" of the dual system have not been eliminated.

I.**The Historical Development of the Dual System of Higher Education**

As of May 17, 1954—the date of *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873

(1954)—the system of higher education in Alabama consisted of (1) the University of Alabama, (2) Auburn Polytechnic Institute, (3) Alabama State Teachers College, (4) Alabama A & M College, (5) Florence State Teachers College, (6) Jacksonville State Teachers College, (7) Livingston State Teachers College, (8) Troy State Teachers College and (9) Alabama College. By July 2, 1965—the effective date of Title VI—the University of South Alabama had been added to the system. The historical development of each of these institutions shall be discussed in turn.

University of Alabama

The University of Alabama is the flagship institution of higher learning in the State of Alabama.

In the 1819 statute granting statehood to the Alabama Territory, an entire township was reserved and appropriated to the state legislature “for the use of a seminary of learning.” The education article of the Alabama Constitution of 1819 provided that there

shall be and remain a fund for the exclusive support of a State University, for the promotion of the arts, literature, and the sciences; and it shall be the duty of the General Assembly, as early as may be, to provide effectual means for the improvement and permanent security of the funds and endowments of such institution.

A year later, the legislature enacted a statute providing “That a Seminary of Learning be and the same is hereby established, to be denominated The University of the State of Alabama.” The University was formally organized in Tuscaloosa in 1831. For the next 129 years, no other state-supported institution of higher learning carried the word “university” in its title.¹ Until the Reconstruction period

¹ The short-lived exception, Alabama Colored Peoples University, is discussed at p. 1147.

of Alabama history, the University of Alabama was the only state-supported institution of higher learning in the state.

From its beginnings until 1956, the University of Alabama ("the University") did not admit black students, pursuant to the ironclad custom and policy of the State of Alabama requiring segregation of the races in all spheres of life. To be sure, the constitutional article and statute creating the University never referred to segregation; but the University board of trustees, consisting, among others, of the governor and state superintendent of education, was evermindful of and obedient to that provision of the 1901 Constitution which recites: "separate schools shall be provided for white and colored children, and no child of either race shall be permitted to attend a school of the other race".

In September, 1952, two black graduates of a private black college, Autherine Lucy and Polly Ann Myers, applied for admission to pursue graduate study at the University. The board of trustees considered the applications on June 1, 1953; and it deferred action on the matter, ostensibly pending a decision by the Supreme Court in *Brown*. The board communicated its action to Arthur Shores, counsel for the applicants, along with the suggestion "that his clients could find courses in subjects desired by them at Tuskegee Institute and the Alabama State College at Montgomery." *Brown* was decided on May 17, 1954; and a year later, the University had not acted on the application.

After a brief evidentiary hearing in the lawsuit, *Lucy v. Adams*, 134 F.Supp. 235 (N.D.Ala.1955), Judge Grooms of this Court found that although there was no written policy or rule excluding blacks from the University, there was a tacit policy to that effect; and he enjoined university officials from denying Lucy, Myers or other similarly situated blacks "the right to enroll in the University of Al-

abama and pursue courses of study, solely on account of their race or color." The injunction was entered on July 1, 1955. The University appealed the case to the Court of Appeals and sought review by the Supreme Court; and on October 12, 1955, the United States Supreme Court denied review. *Lucy v. Adams*, 134 F.Supp. 235 (N.D.Ala.1955); *aff'd* 228 F.2d 619 (5th Cir.1955); *cert. denied*, 351 U.S. 931, 76 S.Ct. 790, 100 L.Ed. 1460 (1955).

The University denied admission to Lucy and Myers in the fall semester of 1955, on the ground that their applications were tardy. Finally, on December 30, 1955, Judge Grooms ordered the university officials to admit Lucy for the second semester, commencing February 3, 1956.

President Carmichael of the University summarized its sentiment:

[T]he court case which was decided on December 25, 1955, had been in litigation for three and a half years. . . . During that period the Board of Trustees sought through all legal means to maintain the historic tradition of segregation which they conscientiously believed to be in the best interests of all concerned. *
* *

Finally, when the last legal battle was decided adversely the trustees were faced with two alternatives, yielding to the court's decree or defying the law. * * [The lawyer-members of the Board of Trustees] as well as other members felt they had no choice but to comply with the court's decree. Accordingly, the Board voted to permit one of the litigants to enroll as a student in the University.

Autherine Lucy did indeed enroll at the University. Despite the denial of dormitory space and dining hall privileges to her by the board of trustees, she attended the first three days of classes. On the third day, February 6, 1956, a mob assembled and attacked her. She was hit with

an egg; but due to the intervention of campus patrolmen, she escaped serious injury. That night, the board of trustees met and voted to exclude Lucy from attending classes until further notice. This action was defended as a safety precaution under the police power of the university.

By February 29, the trustees had not lifted their order of exclusion; and following a show cause hearing that day, Judge Grooms ordered that "the order of suspension or exclusion" be terminated by March 5, 1956. He nonetheless found that the university trustees and officials had neither been derelict in their duty nor defiant of the earlier injunction, but that their action "...was taken in a good faith attempt to so protect the plaintiff and others."²

On the same day as Judge Grooms issued his order, the Board of Trustees met and unanimously adopted a resolution permanently expelling Autherine Lucy because of statements in her pleadings in which she expressed her belief that university officials had suspended her because of her color, and that they had conspired with others to violate the Court's order requiring her admission. Judge Grooms held that the Board of Trustees had properly expelled Autherine Lucy.

The University thus reverted to its all-white status; and remained so for another seven years.

² The board member who testified in support of the indefinite suspension was of the opinion that Autherine Lucy "and the people who were sponsoring her and who were seeking to have her go to the University of Alabama" were deliberately trying to cause trouble and incite riot. Thurgood Marshall, co-counsel for Lucy, pressed the point:

Q Mr. Caddell, what was done by Autherine Lucy or anybody connected with [her] on Monday, February 6 that was unlawful?

A Well, Autherine Lucy came there in a Cadillac automobile; she had chauffeurs with her; she walked about on the campus in such a way as to I suppose, be obnoxious and objectionable and disagreeable.

In early 1963, three black students, Vivian J. Malone, Sandy English, and Jimmy A. Hood applied for admission to the University's main campus; two others, Marvin P. Carroll and Dave M. McGlathery, applied for admission to the University's Huntsville Extension Center. Their applications were not timely processed. On May 16, 1963, this Court ordered the trustees to process the applications and to admit the applicants if they were qualified. The Board minutes reflect that

The Board was faced with a choice between the admission of some of the applicants or the outright disobedience of the order of the Federal Court with consequent prison sentences and other severe penalties for the Dean of Admissions and any successor appointed for him, and everyone else officially connected with the University, which punishment would not prevent such admission. It has therefore directed the Dean of Admissions to notify two negro applicants who have been found qualified of their admission to the University, one at the Huntsville Center and one at Tuscaloosa for the sessions which begin June 10, 1963.

The meeting at which this action was taken was called by Governor George C. Wallace and held at his office at the State Capitol in Montgomery. The Governor "wished his vote recorded against admission because of his position as the constitutional executive office [sic] of the State of Alabama responsible for the peace and tranquility of the State." United States Exhibit ("USX") 9c.

Thereafter, in an effort to prevent the federal court-ordered desegregation of the University,³ Governor Wal-

³ It has been contended that the Governor was not motivated by a desire to prevent desegregation; rather that he was simply seeking to raise a grave constitutional issue concerning the usurpation of state powers by the federal government. A letter written by the Governor

lace publicly announced that he would "stand in the school-house door" when the black students presented themselves for admission.

On June 10, 1963, United States President John F. Kennedy sent the following telegram to Governor Wallace:

I am gratified by the dedication to law and order expressed in your telegram informing me of your use of National Guardsmen at the University of Alabama. The only announced threat to orderly compliance with the law, however, is your plan to bar physically the admission of Negro students in defiance of the order of the Alabama federal district court and in violation of accepted standards of public conduct. State, city, and university officials have reported that, if you were to stay away from the campus, thus fulfilling your

three months after the event lays to rest this attempted revision of history. In that letter, the Governor says, *inter alia*,

As we read the statistics of our Courts, Public Health Departments, we find that a vast majority of the crime committed in this area has been committed by members of the Negro race. . . . Their health records record the fact that a vast percentage of people who are infected with venereal diseases are people of the Negro race. Statistics from the Health Department also reveal the fact that an exceedingly high percentage of illegitimate children in this state and surrounding states are of the Negro race. We find that the Negroes are not aggressive in the respect of making progress and their own ability to live among themselves. * * * It is our firm belief that when God in Heaven made the Negro black, he meant for him to stay that way. Likewise when he made the white race white, He meant for them to be a pure race. *It is our further belief that when the two races mix and mingle in schools, from the first grade through college, this mixing will result in the races mixing socially*, which fact will bring about inter marriages of the races, and eventually our race will be deteriorated [sic] to that of the mongrel complexity. * * * . . . if we can manage to keep our races from mixing, we shall always if we can manage to keep our races.

Letter from Governor Wallace to Art Wallace, dated 9/13/63. AMX 14G. (emphasis added).

legal duty, there is little danger of any disorder being incited which the local town and campus authorities could not adequately handle. This would make unnecessary the outside intervention of any troops, either state or federal. I therefore urgently ask you to consider the consequences to your state and its fine university if you persist in setting an example of defiant conduct, and urge you instead to leave those matters in the courts of law where they belong.

AMX 14B.

The Alabama National Guard was federalized by the President shortly thereafter. On the following day, when Vivian Malone and Jimmy Hood (escorted by United States Marshals) approached the Administration Building, they were met by Governor Wallace at the entrance. He was allowed to read a short statement; and the federalized Commander of the Alabama National Guard then asked the Governor to step aside. The Governor accommodated the request.

In the words of Governor Wallace: "At 3:33 P.M. (cst) June 11, 1963, through the use of Federal Troops [President Kennedy] assumed full responsibility for the presence of Negro students. . ." AMX 14E. Three days later, the President wired the Governor:

Regretfully, it was necessary to send troops to Tuscaloosa to enforce the courts orders. Maintenance of law and order, however, remains your legal and moral responsibility. I know you were opposed to the admission of the Negro students, but that is now passed. They are attending the university, and I would like to withdraw the troops as soon as possible.

AMX 14A.

Governor Wallace's June 17, 1963 response to the President reads:

I can and will guarantee that there will be no sustained violence in Alabama, but with our limited resources, physical and financial, Alabama cannot insure absolutely the personal safety of individual students. Surely you realize that a continuous cause of the tension in Alabama is the presence of the three Negro students on the campuses of the University, and I suggest that you immediately secure their withdrawal.

* * * * *

You have created the situation existing in Tuscaloosa, Alabama. You must assume the responsibility. You cannot usurp the powers reserved to the State of Alabama and then place the burdens thereby created on my shoulders.

AMX 14H.

The evidence does not disclose the date on which the federal troops were removed.

On June 12, 1963, Governor Wallace reminded President Rose of the University that on the preceding afternoon, "President Kennedy with the use of armed Federal troops assumed control of the campus of the University of Alabama which includes the campus at Huntsville." In view of this "illegal and unwarranted military occupation," the Governor decided that he would not "stand in the door" of the Huntsville campus when Dave McGlathery presented himself. He promised that "we will continue relentlessly our fight against forced integration of the University of Alabama." AMX 14B.

The record evidence does not pinpoint the date on which the fight ended; but by 1965, there were 31 black students enrolled at the University of Alabama. Two years later, that number had increased to 119 blacks out of a total student population of 12,251.

Auburn Polytechnic Institute

Auburn University's roots extend to the East Alabama Male College, a denominational school which was started in 1859. Closed during the Civil War, the school reopened in 1866. In 1872, the Methodist Church offered the school to the state; the state legislature accepted it and named the school, "the Agricultural and Mechanical College of Alabama." It was designated as the land grant college of Alabama under the terms of the 1862 Morrill Act. The 1875 and 1901 Constitutions of Alabama expressly recognized the status of the school. Women were admitted in 1892; and in 1899, the name was changed to the Auburn Polytechnic Institute. In 1960, the name was again changed, this time to Auburn University ("Auburn").

From its inception until 1963, Auburn did not admit black students.⁴

In 1962, Harold A. Franklin, a black graduate of Alabama State University, applied for admission to the graduate school of Auburn University. He was denied admission by the Dean of Auburn's graduate school on the stated ground that Franklin's undergraduate degree was awarded by an unaccredited institution. In *Franklin v. Parker*, 223 F.Supp. 724 (M.D.Ala.1963), Judge Frank Johnson ordered Auburn to admit Franklin and

... other qualified Negro applicants to the Auburn University Graduate School, without regard to any statute, policy, practice, custom and usage which may be contrary to the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

⁴ Because of this policy and custom which had the force of law, the legislature designated the Huntsville Normal School as the land-grant college for blacks in 1891 so that Auburn might continue receiving Morrill Act funds.

Id. at 728.

Governor Wallace, as chairman of the Auburn Board of Trustees, then intervened and, through his effort, Auburn University refused to grant dormitory space to Franklin, although the space admittedly was available. AMX 12A. Judge Johnson ordered Auburn to provide the dormitory space forthwith. Franklin was accordingly admitted to Auburn University on January 2, 1964.

Resistance to the desegregation at Auburn in the early sixties was spearheaded by the chairman of its board of trustees, the Governor. Dr. Ralph Draughon, President of Auburn, did not always agree with the Governor's tactics. When Draughon wrote to the Governor protesting the action of State Troopers in barring federal agents from the campus during the Franklin admission, the Governor responded:

Of course, you and I were never in agreement relative to the proposition of integration at Auburn. As you will remember, it was your suggestion that Auburn voluntarily admit a Negro student. This never did and never will receive my approval.

I will say that it is difficult for me to understand the lack of cooperation at Auburn University in that through my efforts the University now has its largest appropriation in the history of the State. My efforts in behalf of Auburn University have apparently had no effect on your attitude.

AMX 12B, p. 3.

The Board of Trustees named a new president in the following year. The new president was the first to sign a statement endorsing the Governor's opposition to the 1966 HEW Guidelines for school desegregation;⁵ and when the

⁵ The President of the University of Alabama apparently refused to endorse the Governor's position.

three-judge court handed down its decision in *Lee v. Macon County Board of Education*, 267 F.Supp. 458 (M.D.Ala.1967), the president of Auburn was again the first to sign a petition urging the Governor and the State Attorney General to request a stay of the judgment pending an appeal of the decision to the United States Supreme Court. AMX 18, 20.

Auburn was not a party in *Lee v. Macon*, and it had no legally cognizable interest in the case. Of course, these public positions of Auburn's president on matters of school desegregation did nothing to dispel the image of Auburn as an institution more concerned with preserving segregation than opening its doors to black students.

By 1970-71, there were only 71 (.6%) blacks among the 1,484 undergraduates enrolled at Auburn; there were 10 black graduate students out of a total of 662.

Alabama State Teachers College⁶

The institution now known as Alabama State University had its origins in Marion, Alabama. In 1867, Jabez L.M. Curry,⁷ ex-confederate officer and former president of Howard College of Marion, organized a mass meeting of blacks in Selma, Alabama, for the purpose of setting up a school for blacks. As a result of this meeting, a black

⁶ The historical facts concerning Alabama State and A & M are based on the evidence and Horace Mann Bond's *Negro Education in Alabama: A Study In Cotton and Steel*. New York, Antheneum, 1969; Robert G. Sherer's *Subordination and Liberation: Development of Conflicting Theories of Black Education in 19th Century Alabama*. University of Alabama Press, 1977. These books are included in the bibliography of Auburn's land grant expert, Dr. William Warren Rogers; and pursuant to A & M's Request For Judicial Notice, they are so noticed.

⁷ Curry later became the General Agent of the Peabody Fund and administration head of the Slater Fund, which donated millions of dollars to black and white schools in Alabama during the period 1868-1914.

school was set up at Marion in that year, with the assistance and financial support of the Conservative Party. In July of the following year, the Alabama Board of Education made an appropriation to the Marion Normal School from the black share of the common school fund.

In November, 1871, Peyton Finley, the black member of the State Board of Education, introduced two bills to the board. The bills provided for the creation of four schools for black teachers, and an equal number for white teachers. The bills were passed a month later; and \$4,750 was divided among the black normal schools at Montgomery, Sparta, Marion and Huntsville.⁸

In 1872, the normal school at Montgomery was not funded; but the appropriation for the school at Marion was made permanent.

Peyton Finley was "a strenuous advocate of the establishment of a University for Negroes in the State, to do for the Negro what the University of Alabama purported to do for white persons." *Bond*, 107. At the first session of the Board of Education which he attended as a member, he presented a resolution urging the creation of a black university and petitioning Congress "for a grant of public lands in aid of such a University." Nothing ever came of this resolution. Later in the year (1871), Peyton introduced a similar bill; but a substitute amendment was adopted which doubled the appropriation for the school at Marion, in lieu of making it a university. Finally, in the latter part of 1873, a bill to establish a "State Normal School and University" was passed by the State Board of Education.⁹ Lincoln Normal School, which had been operated by the American Missionary Society since 1866, was donated to the State for use as the campus of the new university;

⁸ \$4,500 was to be divided among the white schools.

⁹ During this period of Alabama history, the State Board of Education was empowered to enact laws dealing with education.

and a board of directors, consisting of the state superintendent of education and five black citizens, was the governing body of the university.

In 1874, there were one hundred black students enrolled at "normal University." Its appropriation of \$2,000 (compared with the \$2,400 yearly income of the University of Alabama) was doubled the following year. The school had three white faculty members; and the newly elected Democratic school superintendent wrote:

The normal school at Marion is designed to become a University for the colored race in the State; and it is not doubted that its facilities for furnishing the higher education to this race will be amplified as the demand therefor becomes apparent.

Bond, 110.

In 1878, William Burns Paterson was elected president of the State Normal School and University at Marion. Of Scottish birth, he had come to the United States as an immigrant eleven years earlier. He worked at odd jobs from New York to Hale County, Alabama, in which he settled in 1870. Over the opposition of local whites to a white person teaching black people, Paterson set up the Tullibody Academy in Greensboro for the education of black freedmen. Tullibody Academy was so well-respected seven years later that Burns was chosen to head the State Normal School and University, also known as Lincoln Normal University.

The first curriculum at the Marion school was classical only. Between 1880 and 1885, the school developed a carpentry course for the male students. By 1885, Lincoln Normal University consisted of a main building, a small dormitory, and the president's residence. There were 10 faculty members—the only black being the head of the Industrial Department. Its enrollment in that year slightly exceeded 300; it had 17 in the graduating class.

In each of the next two years, pivotal events charted the course of the school. In December 1886, a riot ensued after several white cadets at Howard College (also located in Marion) shoved a Lincoln student off the sidewalk as they walked abreast. In apparent retaliation, the main building at Lincoln School was destroyed by arson; and the Marion city fathers demanded of the legislature that the school be either closed or moved to another city.

The legislature responded by appointing a committee, chaired by the Governor, to determine an appropriate place for the relocation of the school. Montgomery, Selma and Birmingham were considered; but the advocacy of the *Montgomery Advertiser* resulted in the decision to relocate the school in Montgomery in 1887.¹⁰

On February 27, 1887, the legislature enacted a bill "to establish the Alabama University of Colored People, and to provide for its support and maintenance." The Alabama Supreme Court described the legislation:

It establishes a University, with the implied privileges and powers appertaining to such institutions of higher learning, and as contradistinguished from high schools, and even colleges. It is not subject to the supervision of the Superintendent of Education, in whom the constitution vests the supervision of the public schools.

It provides for the appointment of trustees, who are empowered to elect a faculty, and such officers and agents as they deem necessary; to discharge any member of the faculty, or officer or agent, at their pleasure; to prescribe their duties, and fix their compensation; and generally, to govern and control the faculty and the University, "so that the students

¹⁰ Not without significance, Booker T. Washington of Tuskegee Institute (which had been founded with a \$2,000 state appropriation only six years earlier and was only forty miles from Montgomery) secretly lobbied against relocating the school in Montgomery.

therein may be taught in the best manner possible the things they are to live by, preferring always the English language and the industries, to an education for culture only."

Elsberry v. State, 83 Ala. 614, 619, 3 So. 804 (1887).

Upon the creation of Alabama Colored Peoples University at Montgomery, President Paterson secured the assistance of local black leaders; and on October 3, 1887, the university opened in the basement of Beulah Baptist Church with ten teachers and about 400 students.

A few months after the opening of the University, in February, 1888, the Alabama Supreme Court held in *Elsberry* that the act creating the university was unconstitutional, on the ground that the \$7,500 annual appropriation for the university was to be taken from the school funds earmarked for the colored race. The Court reasoned that the school funds apportioned between the races must be appropriated for public schools; and that the Alabama Colored Peoples University was not a public school.¹¹

Alabama Colored Peoples University therefore received no state funding for the 1888-89 school year.

On February 23, 1889, the Legislature reacted to the *Elsberry* decision by creating a State Normal School for Colored Students to be located in Montgomery with an annual appropriation from the colored school fund of \$7,500. The State Board of Education was assigned the responsibility of operating the school. Three months later, the black community in Montgomery donated \$3,300 in cash and 6½ acres of land to the normal school. The school moved into its new quarters shortly after the beginning of the 1889-90 school term.

¹¹ The opinion was written by Justice Clopton, a former representative in the Confederate Assembly and former president of the East Alabama Male Institute (the predecessor to Auburn Polytechnic Institute).

From the turn of the century until the forties, the State Normal School for colored students fared better at the hands of the State Board of Education and the State Legislature than the Agricultural and Mechanical College for Negroes.

By 1902, 56% of the 229 graduates of the State Normal School for blacks were teachers; only 25% of the 736 A & M graduates were teachers.

Between 1920 and 1929, all of the normal schools in Alabama operated under a two-year curriculum. In 1929, the normal schools became teachers' colleges with four-year courses of study; from that year until 1969, the black teachers college in Montgomery was known as "Alabama State Teachers College."

In January, 1949, Governor James E. Folsom appointed a "Committee on Higher Education for Negroes in Alabama." The Committee consisted of 35 distinguished citizens of Alabama, including the presidents of the black state-supported institutions, the State Superintendent of Education, and a Richard T. Rives of Montgomery, who was subsequently appointed to the United States Court of Appeals for the Fifth Circuit. In its final report, the Committee recommended that Alabama State College for Negroes "be developed as the State's University for Negroes," and that a law school for Negroes be established there. It further recommended that Alabama State be appropriated \$695,000 annually (including funds for the law school and expansion of undergraduate and graduate curricula); and that \$2,465,000 be appropriated to the college for capital outlay. These recommendations were never acted on by the legislature.

By the fifties, Alabama State College was offering the master's degree in education. Its undergraduate degree fields included secretarial science and music education. The curriculum had been broadened "to give preparatory col-

lege training for further study in medicine, law, theology, social work, library science, dentistry and nursing."

Alabama State was not accredited by the regional accrediting agency, the Southern Association of Secondary Schools and Colleges, until 1966; and its name was changed to Alabama State University in 1969. It remained under the control of the State Board of Education until 1975. Pursuant to the policy of its governing board, Alabama State could not admit white students until 1967; its first white student enrolled in the following year.

Alabama A & M College

William Hooper Councilll was the single most important force in the origin and development of what was later to become Alabama A & M University. He was born into slavery; and by the time of emancipation, his family lived in Jackson County, Alabama. Largely self-taught, he moved to Huntsville in 1869 and opened a rural school for blacks about four miles west of Huntsville. In Huntsville, Councilll became active in Reconstruction politics and was elected to the position of reading clerk in the Alabama Legislature, where he served from 1872-74. He was admitted to practice law in Alabama in 1883.

Two years after the State Board of Education enacted Peyton Finley's bill creating segregated normal schools, the Huntsville Normal School was established, with an annual appropriation of \$1,000. In 1875, the school formally opened with Councilll as its principal, and 61 students. For the next seven years, the classes were conducted in rented houses in Huntsville.

By 1882, the enrollment at the normal school had grown to 200; and the annual state appropriation had grown to \$2,000. A \$3,000 parcel of property had been purchased, and the two-story building on it had been remodeled for use as a school building.

With \$1,000 donated to the school by the Slater Fund, Councilll inauguated an industrial department of the normal school by 1885. Fifty-five students were receiving industrial training in carpentry, painting, printing, sewing, and horticulture. In the same year, the Legislature doubled the appropriation to the school;¹² and its name was formally changed to "Huntsville State Colored Normal and Industrial School."

Councilll and the students of the Huntsville Normal and Industrial School were involved in separate racial incidents in 1887. While riding on a first-class railroad car from Tennessee to Atlanta in the summer of 1887, Councilll was roughly evicted from the first class section. He filed a complaint with the newly created Interstate Commerce Commission, which ruled that Councilll had not been treated equally and directed the railroad to provide equal service for blacks in the future. This incident caused no real problem with whites in Alabama.

During the same summer, however, several of the students of Huntsville Normal innocently entered the first-class railcar on the train from Huntsville to Decatur. The porter and conductor strongly protested; and, upon learning of the incident, the resulting hue and cry from local whites was so great that Councilll tendered his resignation as principal. The resignation was promptly accepted by the all-white commissioners of the school, and they appointed a new principal. There followed such a groundswell of moral and financial support for Councilll from within and outside the state that the commissioners were persuaded to reinstate Councilll as principal of the school in 1888. He remained in this position until his death in 1909.

Congress enacted the Second Morrill Act in 1890, after it became clear that the Southern states had denied black

¹² The state appropriation was not increased for the next third of a century.

citizens the right to attend the First Morrill Act land grant colleges. The Alabama Legislature set up a commission to determine which of Alabama's three black state-supported normal schools¹³ would be designated as the black land grant school. Tuskegee Institute had the decided advantages: it had more buildings, more students, and the support of both of Alabama's senators.¹⁴ These considerations were not enough to overcome the legislature's reaction to a speech of Booker T. Washington delivered in Montgomery ten days before the decision was to be made. In that speech, Washington attacked as unfair to blacks the School Fund Apportionment Law enacted by the legislature earlier that year; and, to the further consternation of the legislature, he challenged the practice of providing separate railroad cars for blacks. Councill, with the assistance of the ex-Confederate officers on his board, then successfully urged the Legislature not to grant the funds to a black school headed by a white man (i.e., Alabama State Normal School for colored students at Montgomery).

Washington's speech having rendered Tuskegee ineligible,¹⁵ and President Paterson's color having disqualified Alabama State Normal School in Montgomery on February 13, 1891, the Huntsville State Normal School was designated by the legislature as the land grant school for blacks in Alabama.

¹³ Actually, by that time Tuskegee Institute, which had started as a normal school in 1881 with a \$2,000 state appropriation, depended on Northern philanthropists for virtually all of its income.

¹⁴ Senator Pugh introduced an amendment to the Act to permit the funds to go to schools which did not have "college" in their names; Senator Morgan publicly stated that the funds should go to Tuskegee, which has "... done more for the youthful colored population in that State than can be claimed by almost any other State in the South."

¹⁵ Washington apparently learned his lesson well. Five years later, he delivered his famous Atlanta Exposition speech, in which he urged blacks to forego social and political equality with whites and to develop industrial skills.

After it had been designated as the black land grant school in Alabama, the commissioners of the Huntsville Normal School sold the campus in the City of Huntsville and moved the school to a new location four miles north of the city. This new site, at Normal, Alabama, had once been a plantation, race course, and an inn. It had several buildings which were used by the new school as faculty homes, offices, and shops. Palmer Hall, Seay Hall, a barn and a dairy were all constructed between March and August of 1891; and on September 1, the school opened at the new location.

Between 1893 and 1896, Council became convinced that it would be impossible for blacks to attain full equality in the United States; and in his writings and speeches, he urged a gradual migration of blacks to Africa. This philosophy caused his school to lose both black and white support.

Five years after having designated the Huntsville Normal School as the state land grant school for blacks, the Legislature decided to establish two "agricultural experiment stations for the colored race and to make appropriations therefor." One of these was established at the Alabama State Normal School for colored students at Montgomery, to be operated by "its present board of trustees." The other was established at Tuskegee Normal and Industrial Institute; to be operated by a "board of control" consisting of the state commissioner of agriculture, the president of Auburn Polytechnic Institute, and the members of the Board of Trustees of Tuskegee Institute "who reside in the town of Tuskegee, Alabama." The 1896 decision to exclude the Huntsville Normal School from state-supported agricultural research was the beginning of nearly three-quarters of a century of rather blatant discrimination by the legislature and the State Board of Education against the black land grant school.¹⁶

¹⁶ Ironically, as Council's (and thus A & M's) stock fell with the

In the same year, the Legislature changed the name of the school to the "Agricultural and Mechanical College for Negroes," and gave it the power to confer degrees.

From its inception until the summer of 1920, the governing board of A & M was a three-member board of commissioners, with the governor and the state superintendent of education as ex-officio members of the board. The 1894-95 catalog of the institution reflects that

[t]he three Trustees or Commissioners representing the State of Alabama are all men of superior character, education, and wealth. All of them were slaveholders, and commissioned officers in the Confederate army.

State of Alabama Exhibit ("SX") 139, p. 17.

In 1920, the school was placed under the authority of the State Board of Education, where it remained until 1975.

Upon the death of Councill in 1909, his son-in-law, Walter S. Buchanan, was appointed to succeed him.

The Smith Lever Act, providing funds for agricultural extension work, was enacted by Congress on May 8, 1914. At that time, A & M's School of Agriculture was already engaged in extension work, and had been so involved since the 1890's. The 1913 catalog described this work:

The agricultural extension work is intended to reach and help the large mass of farm workers among our people who cannot attend school. The following lines of extension work have been conducted during the past year and arrangements are being made to enlarge the work another year:

1. Farmers' Institute for the adult farmers.

legislature, Booker T. Washington's (and therefore Tuskegee Institute's) stock rose.

2. Boy's Corn clubs for the boys from nine to eighteen years of age.
3. Girls' Tomato clubs for girls from nine to eighteen years of age.
4. School Farm clubs for the purpose of extending the school term and improving the condition of the school.

AMX 38, pp. 23-24.

In 1905-06, there were over 160 students enrolled in the four year college and normal departments of A & M. In 1913-14, there were only 36 students enrolled in the "Teachers' College" of A & M. There were 27 such students in 1914-15. During the same period, over 100 of the A & M students were enrolled in agriculture courses.

Nonetheless, A & M was not designated a co-recipient of Smith Lever funds. After losing in these efforts, A & M's financial condition progressively deteriorated. Its annual \$4,000 state appropriation—lower than of any other state institution¹⁷—was not increased by the legislature until the school was placed under the control of the State Board of Education.

In fact, in 1918, the legislature appropriated only \$1,000 to A & M.

A & M did not fare well under the state board of education. In the same year as it came under board of education control, it was reduced to a two-year curriculum—with emphasis on agricultural and industrial education. It

¹⁷ In 1916 and 1917, Alabama State's annual appropriation was \$15,000. The white normal schools were appropriated \$20,000.00 on the average in those years. The University of Montevallo received \$54,427.68; and the University of Alabama received an annual \$71,000 appropriation. Auburn's \$87,280 was the highest state appropriation in those years.

did not resume its status as a four year school until 1939; while all the "Class A" schools and Alabama State reverted to four year teacher's colleges ten years earlier.

When the legislature established a graduate school in agriculture for blacks in 1945, it was placed at Tuskegee, rather than A & M. A total of \$300,000 was appropriated for the establishment of this school; and a line-item appropriation of \$100,000 was authorized.

Four years later, the legislature authorized the state board to provide courses for blacks in areas such as chemistry, engineering, vocational agriculture, and "such other educational services which in the opinion of the Board of Education is in great enough demand to justify a contract." SX 162. Instead of developing these courses at A & M, the Board of Education contracted with Tuskegee Institute for these courses.

By 1943, there were 562 students at A & M. Fifty-four of these were in agriculture, 118 were enrolled in mechanic arts, and 231 were in home economics. Further,

several classes were taught for out-of-school rural youth in farm machinery repair, blacksmithing, wood working, and general farm production and conservation.

A Farmers' Conference was held in February 1943, bringing to the campus more than 300 farm men and women. * * [T]he extension division served 179 off-campus workers.

SX 168.

In 1948, A & M's name was changed to "Alabama Agricultural and Mechanical College." In 1969, the board of education gave it its present name. It was accredited by the Southern Association of Secondary Schools and Colleges in 1963.

Until the 1967 injunction in *Lee v. Macon*, A & M did not admit white students.

University of South Alabama

Beginning in 1942, the University of Alabama offered extension courses to whites in Mobile—the second largest city in the state. At that time, and until 1963, there was no other state-supported four-year institution serving whites in the Mobile area.¹⁸ By 1963, the University's Mobile Center accommodated some 1,500 part time students.

The University of South Alabama ("USA") was created by the legislature in 1963. Upon its creation, the director of the University Mobile Center became its new president, and upon the request of the board of trustees of USA, the University Mobile Center ceased operations in 1964.

When USA commenced operations in 1964 and for the next three years, its doors were not open to blacks, pursuant to state custom and practice which had the force of law.

Alabama College

The University of Montevallo had its origins in an 1893 legislative act which established "an industrial school for the education of white girls in Alabama." In 1895, Montevallo was chosen as the site for the new school. The name became "Alabama College" sometime thereafter. Men were first admitted to the college in 1956, when the legislature designated Alabama College as the state's college of liberal arts.

In 1969, the Board of Trustees changed the name to the University of Montevallo.

¹⁸ Alabama State College operated a Mobile Extension Center at which black high school graduates could receive their first two years of college education.

As of 1965, the school was still operated for whites only, under the established custom and policy of the State.

Florence, Jacksonville, Livingston and Troy State Teachers Colleges

Florence, Livingston, Jacksonville, and Troy State Teachers Colleges were the result of Peyton Finley's efforts to establish normal schools.

In December, 1871, the State Board of Education enacted a law establishing "a normal school at Florence, Alabama, for the education of white male teachers." The opening of the school was made possible by an 1873 deed to the state of the grounds and buildings of Florence Wesleyan University. The new normal school was appropriated "... at least five thousand dollars of the general educational fund of the State apportioned to the whites." In its 1873 amendment to the act establishing Florence Normal, the board indicated that the school would provide for the education of white female, as well as male teachers.

In 1883, the state legislature established a normal school for "white female teachers" at Livingston, Alabama, and another for white "male and female teachers" at Jacksonville, Alabama. Both schools were initially operated by a board of directors.

In 1887, the legislature "permanently established in the City of Troy, Pike County, . . . a school for the education of white male and female teachers. . . ." A board of directors for the "State Normal School at Troy" consisted of nine trustees and the state superintendent of education. The state board of education subsequently took control of the school, and operated it as one of the four "Class A Normal schools."

By the turn of the century, each of these normal schools, as well as Alabama State Normal School for Negroes, had been placed under the control of the Board of Education.

The four white normal schools were designated, "Class A Normal Schools."¹⁹

In 1920, the Board of Education reduced the curricula of the Class A Normal Schools to two-years. Nine years later, the four-year curriculum was restored at the schools, and they were named "teachers colleges."

Historically, these white teachers colleges received considerably larger state appropriations from the Board of Education than the black colleges. The presidents of the white teachers colleges were consistently paid higher salaries than the president of ASU. Under the 1927 School Code, for example, the white normal schools were each appropriated \$40,000 annually; the "State Normal School for colored teachers located at Montgomery" was appropriated exactly one-half of that amount.

Florence State College did not admit black students until 1963, when Wendell W. Gunn was ordered admitted to the school by this Court. There is no credible evidence that any other black students were admitted to the school prior to 1967.

Livingston University admitted its first black student on January 5, 1966. Not a single black had been admitted to the two other schools prior to the 1967 order in *Lee v. Macon County Board of Education*, 267 F.Supp. 458 (M.D.Ala.1967).

The Board of Education had direct involvement in the day to day administration of the two black colleges under its control. In 1921, for example, the board limited the debt-incurring authority of the president of A & M to \$50. As late as 1960, the Board of Education expelled black ASU students after they had participated in a sit-in. *Dixon v. Alabama-State Board of Education*, 186 F.Supp. 945

¹⁹ The "Class B Normal Schools" were apparently white also; but they generally offered education below the collegiate level.

(M.D.Ala.1960); *rev'd*, 294 F.2d 150 (5th Cir.1961). In discussing Alabama State's lack of accreditation in 1963, Judge Johnson wrote:

Thus, if there was a 'weakness' or graduate program 'insufficiently supported' by faculty and library or a 'very confused situation in the general administration' of the college, it was the responsibility of the State of Alabama, acting through its State Board of Education, to correct these matters instead of allowing these deficiencies to continue.

Franklin v. Parker, 223 F.Supp. 724 (M.D.Ala.1963).

The Southern Association of Secondary Schools and Colleges did not admit black colleges to membership prior to 1956. In that year, Alabama State College was given probationary accreditation for five years. In 1961, accreditation was denied to both Alabama State College and A & M. All of the "Class A" schools were fully accredited. *Id.*, at 725, 726.

The Board of Education and the State of Alabama took various actions which had the effect of stymying the growth and development of both Alabama A & M and Alabama State College. Instead of setting up a School of Veterinary Medicine for blacks at the black land-grant school (since Auburn's School of Veterinary Medicine was by statute "for whites"), Tuskegee Institute was chosen instead. Therefore the annual appropriation went to Tuskegee, rather than to A & M. For a number of years, the state superintendent of education contracted with Tuskegee Institute to provide to black students "courses in engineering, veterinary medicine, and graduate courses offered in home economics and vocational agriculture;" and under this contract alone Tuskegee received \$300,000 annually during the fifties. Obviously, these courses should have been developed at Alabama A & M, and the funds should have gone to that school. Rather than setting up

a nursing school at Alabama State College or A & M,²⁰ the state superintendent contracted with Tuskegee Institute to provide nursing education to blacks.

Until 1966, where black residents of Alabama desired to take a course or program offered by either the University of Alabama or Auburn, but unavailable at A & M, Alabama State College, or Tuskegee,²¹ the state Board of Education funded the difference between the tuition and expenses at the University or Auburn and that of the college or university of their choice.

As of 1965, blacks had never been appointed to the governing boards of any of the institutions of higher learning in the state or to the State Board of Education. Faculties and staffs were rigidly segregated. Alabama State was operated as the black counterpart to the University of Alabama; A & M was the black counterpart to Auburn. The black institutions were unequal, in every objective sense, to the white institutions of higher learning.

The conclusion is inescapable that as of July 2, 1965, the State of Alabama continued to operate a racially separate and unequal system of higher education.

II

Development In The Period 1965-1975

In the 1965-1975 decade, six developments within the system of higher education impacted on its ability to disestablish its racial duality. The three-judge court handed down its decision in *Lee v. Macon County*; the University of Alabama at Huntsville ("UAH"), Auburn University at

²⁰ Presently, there are nursing schools at each of the successors to the "Class A" schools; neither Alabama State College nor A & M has one.

²¹ Tuskegee was considered only in those instances in which the superintendent had contracted with it for a particular course or program.

Montgomery ("AUM") and Troy State University at Montgomery ("TSUM") were established; Athens College became a part of the state system of higher education; and the Alabama Commission on Higher Education ("ACHE") was established.

On March 27, 1967, the three-judge panel in *Lee v. Macon* found that

The State's trade schools, vocational schools and state colleges: continue to be operated on a segregated basis. The operation of these systems is the immediate responsibility of the State Board of Education.

* * * * *

There is no necessity for setting out the facts in detail concerning the operation of these state colleges since the evidence conclusively establishes—the defendants do not controvert it—that these schools have been and continue to be operated as if *Brown v. Board of Education* were inapplicable in these areas.

* * * * *

It is quite clear that the defendants have abrogated, and openly continue to abrogate, their affirmative duty to effectuate the principles of *Brown v. Board of Education, supra*. Although the facts as herein outlined speak eloquently for themselves, there is no more clear an indication of this than Superintendent Meadows' statement that he has done nothing to eliminate segregation in the public schools of Alabama.

267 F.Supp. at 474. The Court proceeded to order the Board of Education to admit blacks to the state colleges under its control, and to "... direct such ... state colleges to recruit, hire, and assign teachers so as to desegregate faculty and to accomplish some faculty desegregation in each such ... state college by September, 1967." 267 F.Supp. at 484.

Reaction was swift. Six years earlier, Governor Patterson had repeatedly urged the state legislature to remove the white colleges from the control of the board of education, so that desegregation efforts would be frustrated.²² At the session of the legislature following *Lee v. Macon*, the legislature wasted no time in enacting Governor Patterson's proposal into law. Motivated by racial considerations, the white colleges thus received separate boards of trustees at the hands of the legislature, while Alabama State College and A & M remained under the control of the State Board of Education.

The University of Alabama started offering extension courses in the Huntsville area in the 1950's. The Army Ballistic Missile Agency was set up in Huntsville in 1956; and four years later, the Marshall Space Flight Center of the National Aeronautics and Space Administration ("NASA") was likewise established there. With the resulting influx of scientists, engineers, and other technicians in the Huntsville area, in the late fifties and early sixties, there was a demand for a graduate program in engineering and the sciences. A & M College was located in Huntsville, but it was never seriously considered as a source for these

²² Governor John Patterson made the following statement to a Joint Session of the Alabama Legislature on May 2, 1961:

I wish to again recommend the enactment of a law placing our State colleges—with the exception of the Negro colleges—under the control of separate boards of trustees if they are not already under such boards. I make this recommendation because I see the need for further decentralizing control of our colleges due to continued attacks by race agitators to integrate our schools. This decentralizing would make it more difficult for these agitators to attack more than one college at a time. I believe the Negro colleges should remain under the control of the State Board of Education. I also recommend the enactment of a law placing the State trade schools under separate boards of trustees for the same reasons. The members of the Boards of Trustees should be appointed by the Governor for fixed and staggered terms, and the Governor should serve a *sex-officio* chairman of the boards in every case.

courses because it was a black school; and under the law and firmly established custom of the State of Alabama, white students could not attend it and white teachers could not teach there. The University's Huntsville Extension Center was the choice of the community, federal government officials and scientists; and as the community and federal government officials were well aware at the time, blacks could not attend the Extension Center.

As found earlier, Dave McGlathery became the first black to attend the Huntsville Extension Center in 1963. He was admitted only under a court order and the "military occupation" by federal troops of the "campus of the University of Alabama, which includes the campus at Huntsville," to enforce the order.

In 1963, UAH started offering degree programs at the master's level; and in the following year, undergraduate degree programs were offered. Doctoral programs in physics and engineering were first offered in 1971.

As of September, 1967, UAH offered programs in four divisions: engineering, general studies, natural sciences and mathematics, and graduate studies. The undergraduate degree programs consisted of: Bachelor of Arts in english, history, and mathematics; Bachelor of Science in physics and Bachelor of Science in engineering, with specializations in electronics, mechanics and systems. Master's degree graduate programs were offered as follows: Master of Science in physics; Master of Science in engineering. UAH offered no doctoral programs in 1967.

The UAH campus is in northwest Huntsville, adjacent to Research Park. Its 13 buildings were all constructed since 1960, and they contain modern equipment and exemplify modern functional design. The UAH main campus consists of 337 acres; it has two modern buildings for medical education and patient health care in a separate, ten-acre medical campus.

Both UAH and A & M are within the city limits of Huntsville.

Prior to 1967, the University of Alabama operated an Extension Center in Montgomery. The Extension Center offered three years of college work, but it did not offer degree programs. Alabama State College was the only four-year, degree-granting, state-supported institution of higher learning in the county. In 1966, the all-white Montgomery Chamber of Commerce reactivated its dormant Education Committee in an effort to establish a four-year state-supported institution for whites in the Montgomery area.

The Chamber of Commerce first approached the University of Alabama; it declined the invitation. Auburn University was next approached, and it agreed to undertake the project. Governor Wallace and the local white elected officials all gave their wholehearted support for the project.

Auburn made no independent study or investigation concerning the need or feasibility of a branch in Montgomery; it basically took the position that while it would do nothing to promote or secure a branch in Montgomery, it would operate a branch there if the legislature made an appropriation for such a branch and assigned it to Auburn.

The Montgomery Chamber of Commerce never considered the utilization or expansion of Alabama State, although the school had existing programs in liberal arts, business and teaching education, and continuing education for adults. The reason is simple: at the time, the Governor and the legislature would not have supported a racially mixed institution of higher learning in Montgomery.

At the very time that the Chamber negotiations with Auburn were being had, the Governor and the legislature were expressing their fury over the decision in *Lee v. Macon*, 267 F.Supp. 458 (M.D.Ala.1967), which had, among other things, required the desegregation of the senior col-

leges under the control of the State Board of Education. In an effort to thwart the decision, the legislature removed the white colleges from the control of the state board and placed them under separate boards of trustees.

On the same day that Governor Wallace signed the bills creating separate boards of trustees for the white teacher colleges, he signed a bill providing tuition grants to students who chose not to attend desegregated public schools; and he also signed the bill creating AUM and appropriating \$5 million for its construction and operation.

Given the mood of the 1967 session of the legislature, it is apparent that it would not have considered the expansion of a black college so that it could serve white students.

AUM is located roughly five miles from ASU in Montgomery. According to the Auburn catalog, AUM "... has developed rapidly, especially since moving to a new 500 acre campus ... in 1971."

Athens State College boasts that it "is both the oldest and the youngest institution of higher education in Alabama's state educational system." It was founded in 1822; and for more than a century, it was operated as a private college by the Methodist Church. In 1974, in the face of an insurmountable financial crisis, the United Methodist Church offered the college to the State of Alabama; and in 1975, over the objection of ACHE, the school was accepted by the State Board of Education subject to the appropriation of operating funds by the legislature.

The legislature authorized Athens State to function as a senior college. It accepts transfers from the junior college community and technical colleges of the State, as well as transfers from the traditional four-year colleges and universities.

In 1981, the legislature placed Athens State and John C. Calhoun State Community College under a single admin-

istration. In the words of the State Superintendent of Education, the two schools are "being operated under one administration now as more or less a single college." The Court concludes that Calhoun Community and Athens College operate in tandem as a four-year college.

The main campus of Calhoun Community College is located in Decatur, Morgan County, approximately ten miles from the main campus of Athens State in Limestone County. Athens State's main campus is roughly twenty miles from the main campus of A & M; and Calhoun Community College's main campus is even closer to A & M.

Calhoun State Junior College was established post-*Brown* and its enrollment was limited to white students until the *Lee v. Macon* decision in 1967.

In 1965, Troy State University ("TSU") set up a branch in Montgomery. Under the policy of the State Board of Education, TSU's Montgomery ("TSUM") branch did not accept black students until forced to do so in *Lee v. Macon*. By 1976, 27% of TSUM's 304 fulltime undergraduate students were blacks.

TSUM offers programs at the graduate and undergraduate level. It operates only evening and weekend classes. TSU operates a nursing program in Montgomery.

Since 1983, TSUM has been accredited independently of TSU.

The programs offered by TSUM largely and unnecessarily duplicate similar courses at ASU. In 1975, ACHE observed and recommended

The situation in Montgomery is further complicated by the presence of an expanding program offered by Troy State University. . . . In Montgomery, except for the nursing program at St. Margaret's Hospital and the law enforcement program at the Montgomery Police Academy, Troy State University should restrict

its offerings to Maxwell Air Force Base. Its programs should primarily serve the needs of the military. Non-military related civilian enrollment should be strictly limited. At neither the graduate nor undergraduate level should Troy State attempt to become a third general purpose institution in Montgomery serving the general civilian population.

TSU's Board of Trustees has obviously ignored the recommendation.

In recognition of the need for a coordinated system of higher education, the Alabama legislature in 1969 created the Alabama Commission on Higher Education ("ACHE"). ACHE consists of twelve members, ten of whom are appointed by the governor (one from each congressional district, the others at large); and one each by the lieutenant governor and the speaker of the house of representatives. Members serve for nine-year terms, and their appointments must be confirmed by the state senate. ACHE serves in an advisory capacity to the legislature and the governor "... in respect to all matters pertaining to state funds for the operation and allocation of funds for capital improvements of state supported institutions of higher education." § 16-5-2 *Code of Alabama of 1975*, as amended.

ACHE is broadly charged with the duty of continuously analyzing and evaluating the present and future needs of higher education in Alabama, establishing statewide long-range planning, coordinating programs in instruction, research and public service, and submitting to the governor and the legislature annually "... a single unified budget report containing budget recommendations for separate appropriations to each of the institutions" in the state system of higher education. § 16-5-5,6,8,9 *Code of Alabama of 1975*, as amended. The commission also has the duty of "classifying and prescribing the role and scope for each public institution of higher education in Alabama," and of recommending changes in the role and scope of respective

institutions "as it deems necessary and which may be agreed to by the governing board" of the affected institution. § 16-5-10(6) *Code of Alabama of 1975*, as amended.

ACHE approval is required for the establishment of new programs or units of instruction. However, any institution may bypass ACHE and go directly to the legislature for approval of the new program or unit. While the University of Alabama and Auburn, because of their status as entities created by the 1901 Constitution,²³ are not required to obtain such approval, they often seek it. The commission has established procedures and criteria for the review of new programs and units, at both the undergraduate and graduate levels. There is a peer review of proposed new undergraduate programs or units. At the graduate level, proposed new programs are referred to an Advisory Council, consisting of the graduate deans of each of the institutions.

The affirmative vote of a majority of the Council is necessary for a recommendation that the program/unit be approved by the ACHE board.

The commission uses a formula process in recommending to the governor and the legislature a budget for each of the institutions. The funding formula, first used in the early seventies, has several components. Faculty salaries, teaching load, class size, differences in the costs of instruction of various subjects, and differences in the level of instruction, are all considered in the formula. The formula is based on the historical cost data of the various institutions; and to the extent that funding inequities have existed in the past, they are necessarily perpetuated in the formula approach.

In its 1975 "Planning Document Number One", ACHE established three categories of public institutions of higher

²³ *Opinion of the Justices*, 417 So.2d 946 (Ala.1982).

learning: (1) doctoral universities, with three subclasses, (2) master's-level state universities, and (3) two-year institutions. Under this classification scheme, the University of Alabama, Auburn, UAB, UAH, and the University of South Alabama are included in Category I. ASU, A & M, and the other state universities are placed in Category II; and the community colleges comprise Category III.

Under the funding formula, Category I institutions are entitled to enhanced funding ratios because of their status.

III

The Land Grant Issue

Prior to the Civil War, the sale of public land was the chief instrument for national development policies. To encourage the development of higher education in the states, for example, Congress set aside public lands in various states for the establishment of "seminaries of learning." The University of Alabama was established pursuant to such congressional action. The orientation and curricular of the original state universities tended to be classical.

In 1862, Congress enacted the Morrill Wade Act, which was designed to foster the development, in each state, of
a

college or colleges where the leading object shall be, without excluding other scientific and classical studies, and including military tactics, to teach such branches of learning as are related to agriculture and the mechanic arts, in such manner as the legislatures of the States may respectively prescribe, in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions of life.

Towards that end, each state was entitled to 30,000 acres of land or land scrip for each of its senators and representatives in Congress in 1860. Alabama was therefore

entitled to 240,000 acres for a land-grant college or colleges. Each state was required to provide the buildings for the college(s).

The Civil War delayed the application of the Morrill-Wade Act to the southern states. During Reconstruction, Mississippi accepted the Morrill Act, and designated two land-grant colleges: the University of Mississippi for whites, and Alcorn University for blacks. Morrill Act funds were divided on a 40:60 basis between the two schools. In Kentucky, South Carolina and Virginia, the First Morrill funds were allocated between black and white land grant schools.

In Alabama, although blacks requested that a land grant college be set up for them, the Legislature designated Auburn as the only state land grant school. It was not open to blacks. Therefore, blacks did not receive any of the benefits of the First Morrill Act. The experience of Alabama blacks was not uncommon in the South; and between 1872 and 1890 northern Congressmen made repeated efforts to require the Southern states to equitably divide the land grant funds. They were unsuccessful in 1872, 1875, 1884, 1886, and 1880. Finally, in 1890, Senator Morrill was successful in persuading Congress to pass the Morrill-McComas Act, the Second Morrill Act. This act provided continuing federal appropriations; and more importantly it contained an anti-discrimination provision:

... no money shall be paid out under this act to any State ... for the support of college where a distinction of race or color is made in the admission of students, but the establishment and maintenance of such colleges separately for white and colored students shall be held in compliance with the provisions of this act if the funds received in such State ... be equitably divided. ...

The Act further provided that the "... institution for colored students shall be entitled to the benefits of this act and subject to its provisions, as much as it would have

been if it had been included under the act of 1862. . . ." The Second Morrill Act is unquestionably a "supplement" to the First Morrill Act.

Meanwhile, in recognition of the need to apply science to the problems of agricultural production, Congress enacted the Hatch Act in 1887. This act made annual appropriations to the "college or colleges" established under the First Morrill Act, "or any of the supplements to the Act, in each state for the purpose of setting up agricultural experiment stations." The Hatch Act recites that "... in any State ... in which two such colleges have been or may be so established the appropriation ... made to such States ... shall be equally divided between such colleges unless the legislature of such State ... shall otherwise direct." When the Hatch Act was passed, the southern states (except the three mentioned) had designated only white institutions as land grant colleges. The Act clearly contemplated that black land grant colleges would be thereafter designated under the Morrill Act, and it gave the legislatures the authority to equally divide the agricultural experimentation funds to include the black institutions.

Auburn was promptly designated as the sole recipient of Hatch Act funds; the black land grant college in this state has never been designated to receive, and for that reason has not received, any such funds. To be sure, the Alabama legislature did appropriate state funds for "colored agricultural experiment stations" in 1896 at Tuskegee Institute and the Alabama State Normal School for Negroes in Montgomery; but neither of these was ever designated to receive Hatch Act funds. Their state appropriations for agricultural research were short-lived. It was only the imminency of this lawsuit that prompted the legislature in 1981, for the very first time, to appropriate a rather meager amount for agricultural research and extension at Alabama A & M.

By the early 1960s, Auburn was receiving approximately \$1,000,000 a year under the Hatch Act alone. By the early eighties, its Hatch Act funds had increased to over \$3,000,000.

In 1883, the legislature established the Alabama Agriculture Experiment Station ("AAES") and placed it at Auburn. All of its scientists and administrators are located on the main campus at Auburn. The vast majority of the academic faculty of Auburn's School of Agriculture and Biological Sciences have joint appointments with the AAES. The head of each academic department in the School of Agriculture is also the head of the corresponding research unit within the AAES. There are 773 employees of AAES.

The work of AAES is divided into three geographical districts within the state. There are 21 substations of AAES; 14 of which are manned. The 1984 state appropriation to AAES was \$8,700,000. Another \$3,800,000 in federal funds was obtained under the Smith-Lever Act and similar federal legislation.

The Food and Agriculture Act of 1977 (P.L. 95-113), requires the director of the State Agricultural Experiment Station in each state where land grant institutions are located, together with the chief administrative officers for agricultural research at the other eligible institutions, to jointly develop, by mutual agreement, a comprehensive program of agricultural research for the state. AAES, A & M and Tuskegee Institute have jointly submitted the required comprehensive program to the Department of Agriculture since 1978; and they have been approved. AUX 6893, 6733, 6735. In these programs, AAES, A & M, and Tuskegee state that they, individually and as a group, "concur with and find no difficulty in the development and administration of a single comprehensive agricultural research program. . . ." There is therefore no basis for Au-

burn's assertion that statewide agricultural research cannot be shared between Auburn and A & M.

Auburn is also the site of the Alabama Engineering Experiment Station.

AAES owns 15,319 acres of land outside the Auburn campus. It has three experiment fields and forest units in four counties. The book value of these off-campus holdings is \$3,406,418.

Auburn's state and federally supported agricultural research over the years have had a significant impact on the economic life of Alabama. As Auburn notes, "[t]hese research activities are also essential to the quality of the University's graduate programs." GX 96.

Lacking this state and federal support for agricultural research, A & M has not achieved a land grant status comparable to Auburn.

In 1914, Congress enacted the Smith-Lever Act, 7 U.S.C. § 341 *et seq.* The statute recites, in pertinent part

That in order to aid in diffusing among the people of the United States useful and practical information on subjects relating to agriculture and home economics, and to encourage the application of the same, there may be inaugurated in connection with the college or colleges in each State now receiving, or which may hereafter receive, the benefits of the [First Morrill Act] and of the [Second Morrill Act] agricultural extension work which shall be carried on in cooperation with the United States Department of Agriculture: *Provided*, that in any State in which two or more such colleges have been or hereafter may be established the appropriations hereinafter made to such college or colleges as the legislature of such State may direct. . . .

Federal funds received under the Smith-Lever Act must be matched by state or local funds.

Governor Emmet O'Neal was notified by the Department of Agriculture, on May 14, 1914, of the need to designate "... the agricultural college or colleges to which the funds in this act are to go." Ten days later, the Governor met with the president of Auburn Polytechnic Institute and thereafter sent a letter to the Secretary of the Treasury designating Auburn as the sole Alabama institution to receive funds under the Smith-Lever Act. Apparently this designation was not widely known; and on June 16, President Buchanan of A & M formally applied to the Governor for a portion of the Smith-Lever funds, and simultaneously submitted a rather detailed plan and budget for the use of the funds by A & M. Upon receipt of the application, the Governor forwarded it to President Thach of Auburn for his "... opinion as to Buchanan's suggestions, and suggest[ed] form of reply."

By the time the Governor's correspondence reached President Thach, President Buchanan had already visited Thach twice concerning the matter. President Thach responded to the Governor on June 26:

According to the Act and your certification, the work has already been established and organized in connection with the land grant college for the whites. . . . The funds available this year is only \$10,000, and this has been appropriated by the Board of Trustees in an enlargement of the work already undertaken throughout the State. The plan includes assistance to the negro race, which will be administered by the staff of officers and specialists already employed. There is, on the part of the present organization, the keenest appreciation of the needs of the negro race, and as the funds develop every effort will be made to render all assistance possible.

There is no credible evidence of any plan of assistance for blacks by Auburn at the time.²⁴

²⁴ The Auburn plan, for example, included "work throughout the

Along with various other institutes and schools, Tuskegee Normal and Industrial Institute also applied for a portion of the Smith Lever funds.²⁵ The Governor indicated to Dr. Washington of Tuskegee that at the time Auburn was designated, "[i]t was understood that a proper proportion of this fund should be used for the benefit of the colored farmers of the State." The Governor was "... of the opinion that your institute should receive a proper proportion of the fund and [I] have so written Dr. Thach, requesting him to take the matter up with you through correspondence." The Governor stated his unequivocal intention to "... approve any plan to which they [i.e., Dr. Thach and Dr. Washington] may agree in reference to a proper division of this fund."

Dr. Thach, with considerable indignation, wrote the Governor on July 28 and told him that as far as he (Thach) was concerned, the matter was "res adjudicata"; that Auburn had been duly designated as the recipient of the funds, that its designation was consistent with the uniform practice of the Southern states to designate the white land grant school as the sole recipient of Smith-Lever funds, and that Auburn had already approved extension plans and let contracts for the extension projects.

He concluded by offering to confer with the Governor "in person concerning the matter." The conference was unnecessary; from that point on, the Governor took the position that he had no authority in the matter.

By resolution of January 15, 1915, the Legislature ratified the action of Governor O'Neal's designation of Auburn for Smith-Lever funds.

State" in various agricultural projects, and "cooperation with the Girls' Tech. Inst., Montevallo." Letter of July 28, 1914. Of course, the Girls' Technical Institute was all-white.

²⁵ The Smith-Lever Act by its terms restricted extension funds to land grant colleges receiving funds under the First and Second Morrill Acts.

The Alabama Cooperative Extension Service ("ACES") was established at Auburn in 1914.

For purposes of service by ACES, the State has been divided into three geographical districts. There are joint appointments between ACES and the academic faculty at Auburn.

Federal law requires that a single, comprehensive program of extension be developed for each state. P.L. 95-113 (1977). A & M, Tuskegee Institute and Auburn have since entered into such a plan. The plan requires the institutions, among other things

"D. To take the necessary steps to effect a joint Extension program at the county, district, and state levels.

G. To develop organizational structures at the county, district and state levels that promote unified programs and discourage fragmentary or duplicative programs.

AUX 6699, p. 3.

The three integral components of any viable land grant university are instruction, research, and extension. The former director of the Alabama Cooperative Extension Service correctly analogized:

It's like love and marriage, you can't have one without the other. . . . You can't have a land grant concept unless you have the three pieces, teaching, research and extension.

Auburn's facilities for agricultural instruction, research, and extension are vastly superior to those of A & M. Suffice it to say that the respective facilities are incomparable. These differences are principally the product of racial discrimination.

Until 1982, the legislature appropriated no money whatever to A & M for agricultural research and extension.

The total sum appropriated by the legislature to A & M for these purposes in 1982-83 was equal to the sum appropriated to Auburn for such purposes in 1947. In comparison to the \$300,000 appropriated to A & M in 1982-83, the legislature appropriated over \$19,000,000 to Auburn for extension, research, and services.

Completely aside from its discriminatory allocation of all federal Hatch Act and Smith-Lever funds to Auburn and the establishment of the AAES and ACES there, the state had a duty to appropriate sufficient *state funds* to A & M so that it could engage in substantial and meaningful agricultural research and extension work. The evidence compels a conclusion that the State of Alabama never intended A & M to function as a "separate but equal" land grant college; its purpose as a land grant school was merely to insure that Auburn would continue to receive the federal funds which enabled it to become the preeminent white land grant institution in Alabama.

IV

Vestiges of the Dual System of Higher Education

Having found that the State of Alabama operated a dual system of higher education at least until 1967,²⁶ the Court now turns to the question of whether the dual system has since been disestablished. Considerations of the racial identifiability of the students, faculty, staff, and governing boards are probative. Likewise, the factors of program duplications between proximate institutions, degree offerings, facilities, and funding are important to a determination of whether the state system of higher education has achieved unitary status.

²⁶ The Court is mindful that some of the defendant institutions admitted a few blacks pursuant to court orders prior to 1967. But the admission of one or two blacks does not signal the end of segregation.

The University of Alabama System

The board of trustees of the University of Alabama is a largely self-perpetuating 12-member board, except for the two ex-officio members. However, each vacancy filled by the board is subject to confirmation by the state senate; and if the senate rejects a person elected to the board, then the senate fills the vacancy. Until 1982, no black had ever been elected to the board of trustees. In that year, two were elected and they are presently serving.

In June, 1969, the board of trustees established the University of Alabama System ("UAS") with three independent and autonomous campuses located respectively at Tuscaloosa ("UAT"), Birmingham, ("UAB") and Huntsville ("UAH"). Each campus has a president, appointed by the board of trustees. The presidents of the three campuses report to the Board through the Chancellor of UAS, who is the chief administrative officer of the system.

At the time this lawsuit was initiated, 12.6% of the fulltime undergraduate students at UAT were blacks; only 4% of its graduate and professional students were blacks. For entering freshmen, admissions decisions are based in part on ACT scores. To the extent that the use of ACT scores by UAT adversely impacts on black students, the intensive recruitment of black undergraduate students compensates for its use. For example, there are now over 300 black undergraduate students enrolled in the College of Engineering, due in large part to the commendable efforts of the university to generate an interest among black high school students in engineering and in attending UAT. UAT professors have demonstrated a continuing concern for the success of such students after their matriculation.

Black students are comfortable in the UAT setting; and their involvement in student activities is accepted and encouraged. Black students have served as president of the

Student Government Association, Homecoming Queen, and in a number of other leadership roles on campus.

In 1982, 22 out of the 826 fulltime faculty at UAT were blacks; only 3 out of the 132 parttime faculty members were blacks. The Dean of the School of Social Work is black; and blacks have occupied two endowed chairs at the University. There is an adjunct faculty exchange agreement between UAT and the predominately black Stillman College, also located in Tuscaloosa. Of the 28 new faculty members hired by the College of Arts and Sciences last year, two are black, another two are asian and one is hispanic. UAT has unsuccessfully recruited and extended offers of employment to other blacks. These efforts and offers were undertaken in good faith.

The programs and offerings of UAT do not unnecessarily duplicate programs and courses of A & M or ASU.

In 1983, blacks constituted 24% of the fulltime undergraduate enrollment at UAB; they accounted for 18% of the total enrollment there. There is no credible evidence of any impediments to the admission of blacks to UAB or to the participation by black students in the activities and affairs of the campus.

UAB's faculty statistics are somewhat bleak. Only 38 (2%) of some 1,325 persons on the fulltime faculty are black; and two of the 361 professors are black. However, more than half of the black faculty have attained tenured status; and another third is on the tenure track.

Blacks account for 11% of the professional nonfaculty at UAB; and for 35% of the other nonscience/maintenance jobs.²⁷ Blacks are well represented in service/maintenance job classification at UAB, accounting for 8.5 out of every 10 such employees.

²⁷ These include administrative, management, secretarial-clerical, technical-paraprofessional, and skilled craft jobs.

The programs and courses of UAB do not unnecessarily duplicate those offered at the main campuses of A & M and ASU. To the extent that either or both of the latter schools continues to offer programs in Birmingham, they unnecessarily duplicate the programs of UAB.

Admission to the freshman class as a regular student at UAH is based on a high school grade point average of "C" and a minimum American College Testing Examination ("ACT") score of 16. Students who do not meet these requirements may be admitted under a special admissions programs.

In 1976, the first year for which such figures are disclosed in the record, 5% of the fulltime undergraduate students at UAH were blacks. Six years later, the percentage remained the same. In the 1984-85 freshman class at UAH, 7.2% of the students are blacks. UAH generally limits its recruiting to its primary service area: Madison, Marshall, Morgan, Jackson and Limestone Counties—in which blacks account for 12% of the total population.

In 1982, there were two blacks on the 194 member fulltime faculty of UAH; and an equal number on the 132 member parttime faculty.

The graduate degree program in administrative science at UAH does not unnecessarily duplicate A & M's master of business administration program.

The undergraduate and graduate teacher education and certification programs offered at UAH unnecessarily duplicate similar and older programs offered at A & M. Since the institution of certain certification and graduate programs in education by UAH, white enrollment in similar courses offered at A & M has drastically declined.

Beginning in 1969, A & M offered an undergraduate degree program in computer science technology. In 1975, it obtained ACHE approval to offer a master of science degree in computer science technology. A year later, UAH

obtained ACHE approval to offer a master of science in computer science. In 1980, UAH sought ACHE approval to offer a bachelor of science degree in computer science. The staff of ACHE recommended disapproval of the program, on the ground that its implementation "... would constitute an unwarranted duplication of the existing bachelor of science program in computer science technology offered by Alabama A & M University." UAH also requested approval of a doctoral program in computer science; and again, the staff recommended disapproval of the proposed program, "without prejudice pending the submission of a statewide desegregation plan", due to "the impact of the program in the Huntsville area." SX 18. The ACHE board of directors rejected these recommendations, and subsequently approved both programs. The existence of these unnecessarily duplicative courses at UAH had the effect of reducing white enrollment in A & M's master's program in computer science from 90% in the mid-seventies to 19% at the present time.

As noted earlier, since 1967 UAH has offered a master's degree in physics. Contemporaneously in 1979, the chairman of the newly-created physics department at A & M and other A & M officials met with the president of UAH, the UAH physics department chairman, and other UAH officials and suggested that the two schools initiate a joint graduate program in physics. The UAH Officials rejected the proposal. Thereafter, in September 1979, A & M submitted to ACHE, for its approval, a proposed master of science degree program in applied physics. The proposed program would consist of two options: optics and materials science. At the urging of UAH, and its staff, ACHE initially disapproved the program in July, 1980. The staff further recommended that A & M and UAH consider a joint master's program in applied physics. Several meetings were held; and in the meanwhile ACHE hired an outside consultant, Dr. Stanley Ballard of the University of Florida, to review A & M's proposed program.

Dr. Ballard evaluated the proposed program, and warmly endorsed the A & M proposed program.²⁸ In his summary, he concluded that "[t]he speciality courses in applied optics and materials science which have been planned by the A & M faculty members show understanding and originality." AMX 122. In further support of its proposed program, A & M obtained an endorsement from the Director of the Spectroscopy Laboratory at the Massachusetts Institute of Technology, who wrote:

The proposed optics program does not appear to significantly overlap the Master's program in the 1980-81 catalog of the University of Alabama at Huntsville. The three or four background physics courses would be similar, but the extensive selection of specialty courses is not offered at UAH. As far as I can tell, a student could not obtain a specialty degree in optics based on the curriculum outlined in the UAH catalog.

Professor William B. White of the Pennsylvania State University's Materials Research Laboratory likewise strongly supported the A & M proposed program, and he also concluded that the proposed program of A & M and that offered by UAH "are by no means identical."

²⁸ His report indicates, *inter alia*:

The proposal is that an M.S. curriculum in applied physics be developed and initiated at Alabama A & M University. In my opinion, this would be a worthwhile project. Applied physics . . . is a rapidly growing field. Modern advances in optics, electronics, materials (surely including semiconductors) and sophisticated computer backup constitute a major force in modern-day research and development in industrial and government laboratories. An inclusive term that is widely used is "electro-optics. . . . The fields that A & M selected for first attention are excellent: modern optics (of course including lasers), and materials science (including applications to solar energy).

. . .

The outlines that were sent me showed a rather complete offering in optics, with some 12 courses listed.

With these endorsements, the ACHE staff recommended approval of the A & M master's program in applied physics; and it was approved by the ACHE board on August 14, 1981.

ACHE has never approved either a program in applied physics or optics for UAH.

Since the approval of the A & M program in applied physics, the legislature has established a line-item (i.e., annual) appropriation of \$600,000 to UAH for the operation of an optics center. It was with this annual state appropriation that UAH was able to set up a Center for Applied Optics, and to entice Dr. John Caulfield to become its director earlier this year. Dr. Caulfield has brought with him to UAH a \$9,000,000 "Star Wars" grant from the Department of Defense.

Auburn University

The Board of Trustees of Auburn University consists of the governor, the state superintendent of education, two members from the congressional district in which the institution is located, and one member from each other congressional district in the state. At the time this lawsuit was filed, no black person had ever served on the board; its first black member was appointed earlier this year. Auburn University and its predecessor institutions have always been operated by a board of trustees.

In 1980-81, blacks constituted 2.09% of the undergraduate enrollment, and 5.4% of the graduate students. For the 1983-84 school year, blacks constituted 2.4% of the undergraduates and 2.1% of the fulltime graduate enrollment. The Auburn main campus has the largest student body of any college or university in the state.

Auburn hired its first fulltime black faculty member in 1970. In the next thirteen years, it hired six more, so that by 1983-84, the seven blacks accounted for .6% of the

total faculty of 1,033. Generally, Auburn does not actively recruit blacks for faculty positions. The reputation of Auburn University in racial matters leaves it at a distinct disadvantage, on a competitive basis, to attract qualified black faculty.

Except for athletes, Auburn admits as regular freshmen only those applicants whose ACT scores are at least 18 and who have an overall grade point average ("GPA") of "C".²⁹

The 18 ACT requirement, standing alone, effectively renders most black high school students ineligible (other than athletes), since the average ACT score of black students is only 12.7. Auburn is aware of the effect of this requirement.

The ACT requirement was first adopted by Auburn in 1962. A minimum 16 ACT was the requirement until 1968, when the minimum was raised by two points.

In 1977, Auburn's Director of Planning and Analysis completed a study entitled, "The Value of ACT and SAT Test Scores as Predictors Of First Year Performance At Auburn University." He concluded:

Both the ACT and the SAT exhibit an acceptable level of predictive validity. Used alone, either is an equally good predictor of college performance. Of equal or greater importance, though, is past performance, as measured by high school grades. Obviously, a wide variety of high school grading practices exist, but the student who receives good grades in high school typically scores high in college. This predictive relationship is at least as strong as (and generally stronger than) those obtained when the ACT and SAT are used as predictors.

²⁹ The Admissions Officer testified that if an applicant has an overall GPA of "B", he or she may be admitted with a minimum 16 ACT score.

Auburn University Exhibit ("AUX") 7468, p. 7.

The study also noted that although "... Auburn freshmen score very high nationally in the college aptitude tests, [they] rank rather low in first year college grade point average." *Id.*, p. 6.

Athletes seeking admission to Auburn are not subjected to the 18 ACT requirement. In fact, there is no minimum ACT or SAT score for them; and within the past five years, Auburn has admitted athletes with scores as low as 6. AMX 149.

Black student participation in campus life and activities at Auburn is at a lower level than that of any of the other state-supported institutions of higher learning.

In *Strain v. Philpott*, 331 F.Supp. 836 (M.D.Ala.1971), Auburn was found to have discriminated against black employees of ACES:

The racial discrimination in this case has so permeated the employment practices and services distribution of the defendants that this Court finds it necessary to enter a detailed and specific decree which will not only prohibit discrimination but will also prescribe procedures designed to prevent discrimination in the future and to correct the effects of past discrimination.

Id. at 844.

The decree was entered in 1971. Twelve years later, the Court wrote: "The underlying problem in this case remains the absence of a more substantial number of blacks in managerial positions at the Alabama Cooperative Extension Service."

Auburn has a 1,871 acre campus, with 71 major buildings.

The evidence tends to support the widespread perception of blacks in Alabama that, except for the presence of black

athletes and the changes mandated by federal laws and regulations, Auburn's racial attitudes have changed little since the fifties.

The relevant statistics at AUM stand in stark contrast to those of the main campus of Auburn. In 1972, 3% of the undergraduate enrollment at AUM was black. By 1982, 588 (16%) of the 3,570 undergraduates enrolled there were blacks. Only 4% (15 out of 375) of its graduate students in 1972 were blacks; ten years later, the number had increased to 29 (10%) blacks out of a total graduate enrollment of 268.

The regular admissions requirements at AUM are not as high as those of the main campus. A grade point average of "C" and a minimum ACT of 16 are required for regular admissions. There are special admissions programs for students not meeting those requirements; and roughly 10% of the students are admitted under these special programs. The institution vigorously recruits black students. The student activities coordinator is black. Black students are actively involved in the campus life at AUM, one having served as president and three others as vice presidents of the student government association.

AUM hired its first fulltime black faculty members in 1971, when two were hired. By 1983, ten (5%) of the 179 fulltime faculty members were blacks, and 9% (12 out of 128) of the parttime faculty was black. In recent years, AUM has recruited blacks for faculty positions; indeed, it has attempted to recruit at ASU and Alabama A & M. Today, 13 blacks are among the 189 member fulltime faculty. A black has served as a department head; and five blacks hold tenured positions.

There is substantial needless duplication of the education and business programs offered by AUM and ASU. The presence of duplicated programs at AUM—a much newer and more attractive facility than ASU—has a negative impact on white enrollment at ASU.

Alabama State University

As noted earlier, Alabama State University ("ASU") was removed from the control of the State Board of Education and given a separate board of trustees in 1975.

The board of trustees of ASU consists of the governor, a member from each of the state's congressional districts, and two members appointed from the state at large. There is only one white on the board of trustees (other than the governor); and the governor has generally appointed blacks (14 out of the 19 appointments) to the board.

As of 1982-83, there were 3,369 fulltime undergraduates at ASU; only 4 of whom were whites. In the 1972-73 school term, there were 50 whites among the 2,552 fulltime undergraduates. In an effort to recruit white students, ASU has offered a full scholarship to the valedictorian and salutatorian of each Alabama high school. The program has been in effect since 1969; but it has been frustrated by white high school officials who respond by referring their top black students to ASU. There is no showing of involvement of white students in the campus life at ASU. There are only 3 whites in ASU's graduate programs.

In 1982-83, whites made up 19% (37 out of 193) of the fulltime faculty at ASU. In 1979-80, whites constituted 21% of the fulltime faculty. Nearly half (18 out of 41) of the parttime faculty is white.

In *Craig v. Alabama State University*, 451 F.Supp. 1207 (M.D.Ala.1978), ASU was found to have engaged in a pattern of discrimination against whites in hiring and promotions.³⁰

³⁰ Most of the findings in that case relate to actions taken, or not taken, by ASU during the time that it was operated by the state board of education. There is no evidence of discrimination against whites by ASU at anytime since it was given a separate board of trustees.

ASU still operates graduate programs of education in Birmingham, Mobile, Selma, and Uniontown. The programs in Birmingham and Mobile unnecessarily duplicate programs offered by UAB and USA, respectively.

Alabama A & M University

Since 1975, A & M has operated under an independent board of trustees. The board's membership includes the governor, two members from the congressional district in which A & M is located, one member from each other congressional district in the State, and three members from the state-at-large. Two of the present members of the board are whites. Since the board was created in 1975, 12 blacks and 7 whites have been appointed to it.

During the 1982-83 school year, there were only 41 whites among the 2,977 fulltime undergraduates at A & M. There has been a gradual decrease in the white enrollment at the school over the last few years. In 1976-77, for example, whites accounted for 8% (292 out of a total of 3,375) of the undergraduate fulltime enrollment. In 1982-83, only 10% of the graduate enrollment was white; whereas only four years earlier (1978-79) 39% of the fulltime graduate enrollment was white. This decrease in white enrollment at A & M is directly attributable to the duplicative course and program offerings at UAH and Athens State-Calhoun Community Colleges.

There is substantial desegregation of A & M's faculty. As of 1983-84, 25% of the fulltime faculty was white. In the preceding four years, an average of 29% of the fulltime faculty was white.

Despite the lack of adequate agricultural facilities, A & M has completed beneficial agricultural research on triticale, remote sensing, and soybean breeding. Its significant research activities in remote sensing have continued despite attempts by state agencies to divert this research to Auburn.

A materials science research experiment of one of A & M's professors was selected for inclusion on a Space Lab 3 mission. His laboratory at A & M is an inadequate facility adjacent to the boiler room in the basement at A & M. The professor, Dr. Lal, has been commended by the governor and the legislature; but he has not received any state funding for his research activities.

A & M owns 875 acres of land, including its campus.

The extent of renovations over the last 30 years at A & M adversely affects its ability to attract white students. Vehicular and pedestrian roadways and sidewalks are in serious need of repair; buildings are boarded up. The overhead power lines, bare ground, surface erosion and parking lots interspersed among the buildings detract from A & M's overall appearance. Substantial renovations and new construction are necessary to enhance A & M's attractiveness to white students.

A & M's attempts to enhance its program offerings are discussed at pp. 67-70, *supra*.

In 1981, A & M applied for approval of a doctoral program in nutrition science. The only reason for the disapproval of the program was that

... the proposed program represented a request for a change in the role and scope of A & M University as outlined in Planning Document Number One. It was the Commissioner's opinion, any revision in role and scope for institutions should be addressed through statewide planning activities.

University of South Alabama

The USA board of trustees consists of the governor, the state superintendent of education, three members from Mobile County, three members from the state at large, one member from each of the nine state senatorial districts

in the southern third of the state. The first and only black person was appointed to the board in 1984.

By 1971, however, blacks constituted 6% of the total student body. As of 1983, 10% of the total enrollment was black. 65% of USA's 1983-84 undergraduate enrollment of 2,317 students came from Mobile County; and blacks constitute 31% of the population of the county.

An applicant for regular undergraduate admission must have an ACT score of at least 16, or a combined SAT score of at least 800. Students who do not meet this requirement may be admitted under a "limited enrollment program." Students may transfer to USA after completion of junior college, if they have maintained at least a "C" average. This transfer policy is one means by which greater numbers of black students may gain admission to USA, since the predominately black Bishop State Junior College is now operating in the Mobile area.

In addition to its College of Arts and Sciences offering 29 baccalaureate degree programs and seven master's programs, USA now has colleges of business and management, education, engineering, allied health, nursing and medicine.

USA hired its first black faculty member in 1968; in that year, it has over 120 white faculty members. As of 1983, there were 15 fulltime black faculty members and 500 whites. Five (11%) of the 44 parttime faculty members were blacks. At the undergraduate level, there was only one black professor, one black associate professor, 4 black assistant professors, and 3 black instructors.

USA has entered into a consent decree with the United States which provides for, among other things, the development and enhancement of an increased number of black faculty.

University of Montevallo

The board of trustees of the University of Montevallo consists of the governor, the state superintendent of education (ex officio), a member from each congressional district, and two members from the state at large. The sole black member of the board was appointed in 1983.

Today, blacks constitute 9.1% of the University of Montevallo's student body; and they vigorously participate in the life of the university. There are presently nine blacks on the faculty of the university; over a dozen have been employed there over the past eight years.

The University of Montevallo has entered into a consent decree with the United States which provides for, among other things, the development and enhancement of an increased number of black faculty.

The board of trustees of the University of North Alabama consists of the governor (who is ex-officio president), the state superintendent of education, six members from the Seventh and Eighth Congressional Districts of Alabama and three members from the state at large. The trustees are appointed by the governor for twelve-year terms, and approved by the Senate. Since 1975, there has been a single black serving on the board of trustees.

Today, blacks constitute 8% of the UNA's total student population of 4,825. The school utilizes an "open door" admissions policy; and there is no evidence that the admissions policies of UNA actively discriminate against blacks or that blacks are adversely impacted by such policies. Black students are actively involved in the campus life.

Presently, there are 7 fulltime blacks on UNA's total faculty of 192. The first fulltime black faculty members were hired in 1969. There are no black administrators or professional staff members at UNA presently; although

there have been as many as two such persons between the years 1976-1981.

The programs and courses of UNA do not unnecessarily duplicate those offered by A & M, due to the considerable distance between the schools.

Jacksonville State and Livingston Universities

The Jacksonville Normal School and Livingston Female Academy and Normal School became four-year teachers colleges for whites in 1929.

The board of trustees of Jacksonville State University consists of the governor, the state superintendent of education, two members from the congressional district in which the university is located, and one member from each of the other congressional districts in the state. The board of trustees of Livingston State University is similarly constituted, except that it has four additional members, appointed from the state-at-large. The first black to serve on the Livingston board was appointed in 1981; a similar appointment to Jacksonville's board was made in 1983.

As of 1982-83, Livingston had 1,458 students; 567 (38%) of whom are black. On its 57 member faculty, there are presently no blacks. Six black persons have been hired as faculty members at Livingston since 1974, but they have all left the school for reasons unrelated to race. Other blacks have been offered positions at Livingston, but they have declined employment there, again for reasons unrelated to race.

As of 1982-83 blacks accounted for 16% of the total student population at Jacksonville. Nine (3%) of the 267 faculty members there were blacks.

Both Livingston and Jacksonville have entered into consent decrees with the United States, under whose terms

the schools are obligated to implement special programs to develop and enhance black faculty over the next five years.

The programs and courses of Livingston and Jacksonville do not unnecessarily duplicate the programs of Alabama State University and Alabama A & M University because of the distances involved.

Troy State University

The board of trustees of TSU consists of the governor, the state superintendent of education, two members from the congressional district in which the school is located, and one member from each of the other congressional districts in the state. No black has ever been appointed to TSU's board of directors.

Black enrollment at TSU's main campus has risen from 2% in 1972-74 to 19% in 1984-85. The admissions office actively and successfully recruits black students.

Unconditional undergraduate admission requires a minimum 16 ACT score and a "C" average. Conditional admission is available to applicants scoring less than 16 on the ACT but having at least a 2.3 ("C") grade point average in high school work. Without regard to ACT scores or grade point averages, TSU accepts transfers of junior college students who have maintained a "C" average for two quarters.

The programs and courses offered by TSU at its main campus and in Dothan, Alabama do not duplicate the program courses offered by Alabama State University.

The fulltime faculty of TSU's main campus consists of 5 blacks and 150 whites.

The programs and courses offered by TSUM largely and unnecessarily duplicate various programs and courses offered by ASU in Montgomery. At the undergraduate level,

there are at least 15 unnecessarily duplicated programs; and an equal or greater number of duplicative courses are offered by TSUM at the graduate level.

Between 60-72% of TSUM's enrollment is white. In 1982-83, TSUM had an average of 549 fulltime students and an average of 1,502 parttime students. Its fulltime faculty consisted of one black and 25 whites.

Athens State

Admission requirements of Athens State are simple: a degree from a regionally accredited two year institution; a diploma from a technical college or institute; or the completion of 96 quarter hours of college credit with a 2.0 grade point average on a 4.0 scale.

As of the winter quarter of 1985 Athens State had a student enrollment of 1,148; 473 of whom were enrolled on a fulltime basis. Only 5% of its students live on campus. 1,045 of its students are white; and 78 (7%) are black. Four of its 43 faculty members are blacks.

Nearly two-thirds (63%) of Athens' current students are majoring in business administration (43%) or education (20%). State Board of Education Exhibit ("SBX") 256.

The college division of Calhoun Community College had 4,126 white and 422 black (8%) students in the 1984-85 school year. Over three-fourths (78%) of the college division's students reside in either Madison County (49%) or Morgan County. Sixteen percent of the population of those two counties is black. All of its students are commuters. The college division accounts for 61% of the students at Calhoun Community College. Its faculty consists of 120 members.

Black students at Athens State have been warmly received. They participate vigorously in the activities of the college. In 1980, a black student was elected president of

the Student Government Association; and black students are well represented in the activities and life of the college.

ACHE has consistently opposed the state operation of Athens State, on the ground that its courses and programs needlessly duplicate existing programs at A & M and UAH. Athens State's undergraduate programs in education, humanities and sciences, science and engineering, and business administration needlessly duplicate some 39 courses offered at A & M.

Calhoun Community College offers evening extension courses at West Lawn Middle School and Huntsville High School—both located in the City of Huntsville. As of the fall of 1983, sixteen of those courses needlessly duplicated evening courses offered by A & M. In the preceding year, 25 such courses were needless duplications. The vast majority of the 1,700 students enrolled in these Huntsville extension courses are white.

Athens State also offers courses in Huntsville, housed at Redstone Arsenal. In the 1984-85 school year, 198 students were enrolled in these courses. The overwhelming majority of these students are white.

The State Board of Education consists of the governor (as president and ex-officio member), and eight members elected from each of the congressional districts of the state. Prior to 1969, the members of the board were appointed by the governor from the respective congressional districts. The Board of Education has "general control and supervision of the public schools," except those institutions of higher learning having boards of trustees. § 16-3-11, *Code of Alabama of 1975*. The Board of Education adopts the "rules and regulations governing the training and certification of teachers."

There has not been a black member of the Board of Education since Reconstruction.

As mentioned earlier, the board promulgates the standards and criteria for teacher education and certification programs at all of the state's institutions of higher learning. Without prior board approval of a teacher education program, it is not eligible for either accreditation by the regional accrediting agencies or state funding. The unnecessarily duplicative education and certification programs at UAH, Athens State, AUM, and TSUM have all been approved by the State Board.

For a while during the last five years, the Board of Education administered the Emergency Secondary Scholarship Program established by the legislature and under which prospective teachers are given two-year full scholarships to the college of their choice. During the two years that the state board administered the program (1982-83 and 1983-84), not a single black applicant was among the 36 who were awarded scholarships.

Without exception, no black has ever been appointed to the presidency or other chief administrative office in a traditionally white university or college in the state; no white has served in a similar position at ASU or A & M since 1915. With one or two exceptions, the deans of the various schools and colleges within the traditionally white universities are whites; similarly, the black universities generally have black deans.

Alabama's choice of resource allocation for facilities for the period 1965 to 1983 significantly impaired the ability of Alabama State and A & M to attract white students. In both cases, a new campus has been constructed in the very city in which the black university is located. Aside from the new campus, the new institution is in each case operated by either the University of Alabama or Auburn University—indubitably the two most prestigious schools in the state. The relative quality and quantity of the facilities and equipment of ASU and A & M leave them at

a great disadvantage in competing against the proximate institutions for local white students.

Overall, both white students and traditionally white institutions are in a favorable financial position when compared with black students and traditionally black institutions in Alabama. For the period 1970-1983, ASU and A & M received less state and local appropriations per fulltime equivalent student than the University of Alabama at Tuscaloosa, Auburn, the University of Alabama at Huntsville, and Auburn University in Montgomery.

In 1982-83, the faculty at the University of Alabama and Auburn were paid, on the average, 28% more than faculty at Alabama State and A & M.

The funding formula and institutional classifications utilized by ACHE impede the disestablishment of the dual system of higher education, since they freeze in the effects of past funding and institutional discrimination against ASU and A & M.

The continued recognition of a special "constitutional status" for the University of Alabama and Auburn due to their inclusion in the 1901 Constitution, when ASU and A & M were omitted from the said Constitution for racial reasons,³¹ is a vestige of the dual school system.

The student bodies of Auburn, AUM, ASU, A & M, UAH, and Athens College are still identifiable by race. The faculty of each institution in the system is identifiable by race, considering the total number of black and white faculty employed in the system and other evidence in the record.

Upon consideration of all of the evidence, the Court concludes that the State has not dismantled the dual system of higher education.

³¹ See *Hunter v. Underwood*, ___ U.S. ___, 105 St.Ct. 1916, 1920-21, 85 L.Ed.2d 222 (1985).

V

Special Defenses

The State of Alabama, Auburn University, and various other defendants have asserted that there is no system of higher education in Alabama; that this case is barred by the holding in *ASTA v. College Authority*, 289 F.Supp. 784 (M.D.Ala.1968); that ASU and A & M lack standing to assert cross-claims against the State of Alabama, and that the plaintiffs have failed to exhaust their administrative remedies under Title VI.

Most of the defendants deny that there is a system of higher education in Alabama. The Alabama legislature disagrees, for in the legislation creating ACHE it expressly refers to "the state *system* of public higher education . . ." § 16-5-10(2) *Code of Alabama of 1975*.

Members of the board of trustees of every defendant university are appointed by the governor of the state, with the sole exception of the University of Alabama. Every trustee, including those at the University of Alabama, must be confirmed by the Alabama state senate. The governor is the ex-officio chairman or president of the board of trustees of every state supported university—and as the evidence has shown clearly, that position is not merely ceremonial. With the exception of the traditionally black universities, the state superintendent of education is a member of the board of trustees of every state-supported university. Generally³² on each board is at least one trustee appointed from each congressional district of the state.

Every university is required to submit a budget proposal to ACHE; and, in turn, ACHE is required to submit "a single, unified budget report" to the governor and the legislature.

³² Only the University of North Alabama and the University of South Alabama lack at least one trustee from each congressional district of the State.

Each new academic program or unit of instruction must be approved by ACHE; and it has the power to authorize and to regulate the off-campus offerings of the state universities.

As early as 1927, the State Board of Education was empowered to approve standards for teacher education programs at all of the state-supported colleges and universities, including those of the University of Alabama and Auburn. SBX 253-P.

Finally, in *ASTA*, the three-judge court judicially noticed that "Alabama has traditionally had a dual system of higher education"; and it found "as a fact that the dual system in higher education had not been fully dismantled." The defendants are estopped, therefore, from denying the existence of a system of higher education.

ASTA

In *ASTA* a three-judge court upheld the constitutionality of the legislation establishing AUM, both on its face and as applied.

Because "... no court dealing with desegregation of institutions in the higher education area has gone farther than ordering non-discriminatory admissions," and HEW "... has also largely limited its concern to admissions policies in administering Title VI of the 1964 Civil Rights Act," the Court stated that it, too, was "reluctant at this time to go much beyond preventing discriminatory admissions." 289 F.Supp. at 787 (emphasis added). The Court noted that since "[h]igher education is neither free nor compulsory", it is significantly different from elementary and secondary education. It concluded that

as long as the State and a particular institution are dealing with admissions, faculty and staff in good faith the basic requirement of the affirmative duty to dismantle the dual school system on the college level, to

the extent that the system may be based upon racial considerations, is satisfied.

Id. at 789, 780.

The decision of the court was summarily affirmed by the United States Supreme Court. 393 U.S. 400, 89 S.Ct. 681, 21 L.Ed.2d 631 (1969).

As Judge Johnson, the author of the *ASTA* decision, has recently written:

A summary affirmance of the Supreme Court has binding precedential effect. [Citing cases]. Yet because the court disposes of the case without explaining its reasons, the holding must be carefully limited. A summary affirmance by the Supreme Court represents approval by the Supreme Court of the judgment below but should not be taken as an endorsement of the reasoning of the lower court.

Hardwick v. Bowers, 760 F.2d 1202, 1207 (11th Cir.1985).
Moreover,

- ... a summary disposition binds lower courts only until the Supreme Court indicates otherwise. [cites omitted]. ... Doctrinal developments need not take the form of an outright reversal of the earlier case.
- The Supreme Court may indicate its willingness to reverse or reconsider a prior opinion with such clarity that a lower court may properly refuse to follow what appears to be binding precedent.

Id. at 1208-09.

This Court concludes that in affirming *ASTA*, the Supreme Court merely agreed that the statute which authorized the establishment of AUM is not unconstitutional.

Since *ASTA*, there have been doctrinal developments inconsistent with the reasoning of the panel decision. First, the same three-judge court subsequently held that new

construction at the traditionally white junior colleges in Alabama could not be undertaken "until [the traditionally black] Mobile State Junior College has been transformed into a fully desegregated two year institution . . .". *Lee v. Macon*, 317 F.Supp. 103 (M.D.Ala.1970). Attendance at junior colleges, just as senior colleges, is "neither free nor compulsory."

More important are two post-ASTA higher education decisions. In *Norris v. State Council of Higher Education*, 327 F.Supp. 1368 (E.D.Va.1971), a three-judge court enjoined the escalation of a predominately white two-year state-supported college to a four-year degree granting college, where the effect would have been to impede the desegregation of a traditionally black college in close proximity. The court there expressly declined to follow ASTA; and the Supreme Court summarily affirmed. *Board of Visitors v. Norris*, 404 U.S. 907, 92 S.Ct. 227, 30 L.Ed.2d 180 (1971).

More recently, in *Geier v. University of Tennessee*, 597 F.2d 1056 (6th Cir.1979), the court implicitly rejected the ASTA reasoning when it affirmed a district court's decision to merge the predominately black Tennessee State University with the traditionally white University of Tennessee at Nashville. The Supreme Court denied certiorari in the case. 444 U.S. 886, 100 S.Ct. 180, 62 L.Ed.2d 117 (1979).

Further, the United States Office of Education, the agency charged with administration of Title VI now requires more than open admissions. As shown earlier, the ASTA reasoning was based in part on the fact that HEW, predecessor of the Office of Education, "limited its concern to admissions policies in administering Title VI." 289 F.Supp. at 787. It is precisely the newer standards of the Office of Education which precipitated this lawsuit.

Finally, the ASTA court indicated that much of its ". . . discussions were based on speculation. . . ." *Id.* at 789.

The court assumed that "... as effective desegregation plans are developed in the elementary and secondary public schools, the problem will probably resolve itself in the case of higher education." *Id.*, at 790. Seventeen years later, the sad fact is that the problem has not resolved itself. Freedom of choice in higher education, as in public school desegregation, was perhaps a necessary first step in the effort to dismantle the dual school system. But having failed to work in dismantling the dual system of higher education, the *ASTA* approach must now give way to a desegregation plan that promises realistically to work. *Geier, supra*.

The contention that ASU and A & M are creatures of the State of Alabama and, as such, lack standing to sue the defendants in this case requires little discussion. In *Washington v. Seattle School District No. 1*, 458 U.S. 457, 102 S.Ct. 3187, 73 L.Ed.2d 896 (1982), the Seattle, Washington School Board—no less a creature of the State of Washington than ASU and A & M are creatures of the State of Alabama—sued the State of Washington under the Fourteenth Amendment. There the Supreme Court held that the State had violated the Equal Protection Clause of the Fourteenth Amendment by the challenged legislative action. The dissent by Justice Powell never once suggests that the school board lacked standing to bring the lawsuit. Further, in the view of the court, *Monell v. NYC Dept of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), makes it clear that as bodies corporate, ASU and A & M are "persons" within the meaning of 42 U.S.C. § 1983.

There is no jurisdictional bar to the assertion of cross-claims by ASU and AUM against the other defendants.

With respect to the § 1983 claims in this case, there is certainly no requirement of exhaustion of remedies. *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982). In *University of*

California Regents v. Bakke, 438 U.S. 265, 283, 284, 98 S.Ct. 2733, 2744-45, 57 L.Ed.2d 750 (1978), the Supreme Court expressly did "... not pass upon petitioner's claim that private plaintiffs under Title VI must exhaust administrative remedies;" and the Court's attention has not been directed to any subsequent case in which the Supreme Court has addressed the issue. In any event, the resort to administrative remedies under Title VI (assuming the existence of such remedies) would prove futile or inadequate. To the extent that the defendants and the plaintiffs desired to reach a voluntary agreement in this case, they have had every opportunity to do so.

By separate order, the defendants shall be required to develop and submit to the Court a plan for the dismantlement of the dual system of higher education in this state.

ORDER

In conformity with the Memorandum of Opinion issued contemporaneously herewith, it is ORDERED that the defendants STATE OF ALABAMA, GEORGE C. WALLACE, THE ALABAMA COMMISSION ON HIGHER EDUCATION, and THE ALABAMA PUBLIC SCHOOL AND COLLEGE AUTHORITY shall submit to the Court, not later than February 14, 1986, a plan to eliminate all vestiges of the dual system of higher education in Alabama.

The plan shall utilize the United States Office of Education's "Revised Criteria Specifying the Ingredients of Acceptable Plans to Desegregate State Systems of Higher Education", published in 43 Fed.Reg. 6658 (Feb. 15, 1978).^{*} Livingston University, Jacksonville State University, the University of Montevallo, and the University of South Al-

^{*} [N.B. by petitioners. At a hearing on January 17, 1986, the district court orally eliminated this sentence.]

abama shall not be included in the plan. Troy State University (Main Campus), the University of North Alabama, and the University of Alabama (Tuscaloosa and Birmingham) shall be included in the plan only to the extent of faculty desegregation.

Within fifteen (15) days after the submission of the plan, the affected institutions shall submit their comments or objections to the plan. Such comments or objections shall be limited to a maximum of twenty-five (25) pages.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-7582

UNITED STATES OF AMERICA, et al.,
Plaintiffs-Appellees,
JOHN F. KNIGHT, JR., et al.,
Plaintiffs-Intervenors,
Appellees,

v.

THE STATE OF ALABAMA, et al.,
Defendants,
THE ALABAMA STATE BOARD OF EDUCATION;
WAYNE TEAGUE, State Superintendent of Education,
Defendants-Appellants.
Appeal from the United States District Court
for the Northern District of Alabama.

[Filed June 6, 1986]

Before VANCE and JOHNSON, Circuit Judges, and
ALLGOOD*, Senior District Judge.

JOHNSON, Circuit Judge:

We review here the district court's decision to enjoin
the Alabama State Board of Education ("the Board") and

* Honorable Clarence W. Allgood, Senior U.S. District Judge for the
Northern District of Alabama, sitting by designation.

its members from refusing to recertify certain Alabama State University (ASU) teacher education programs. We REVERSE the district court's entry of the injunction against the Board and its members on behalf of ASU, and the entry of the injunction against the Board on behalf of a class of intervening plaintiffs. WE AFFIRM the entry of the injunction on behalf of these intervenors against the Board members acting in their official capacities.

I

The injunctive order at issue here arises from a July 1983 action originally filed by the United States under 42 U.S.C.A. § 1983 and 42 U.S.C.A. § 2000d et seq. (Title VI) against the state of Alabama, state education authorities, and all state four-year institutions of higher education in Alabama. This suit charged that Alabama impermissibly operates a dual system of racially segregated higher education.

The court below granted the motion of Alabama State University, a majority-black institution located in Montgomery, Alabama, to realign as a plaintiff. The court also permitted John F. Knight and other faculty, graduates, employees and students at ASU ("the Knight intervenors") to intervene as plaintiffs, and certified them as representatives for a class including graduates of ASU; black adults or minor children in Alabama presently attending, or eligible to attend now or in the future, any public institution of higher education in the Montgomery area; and black citizens who were, are or will become eligible to be employed by such institutions. As a realigned plaintiff, ASU raised several additional claims, seeking chiefly to challenge Alabama State Board of Education requirements for approval of certain teacher education programs. By joint motion, these issues were severed from the main statewide action and set for later trial.

Meanwhile, during the pendency of these proceedings, the state Board voted not to recertify certain undergrad-

uate and graduate teacher education programs at ASU. On motion by ASU and the Knight intervenors the district court enjoined the Board action to maintain the status quo pending resolution of the substantive questions before it and to preserve its jurisdiction. In reaching its decision the court below concluded that the Board's action was improperly retaliatory—that is, that the Board refused to recertify the ASU education programs in order to punish ASU for bringing suit. It is this injunctive order that comes before us for review.

II

We turn first to certain jurisdictional issues raised by appellant. The state Board argues that the district court did not have jurisdiction to grant ASU an injunction since the latter had no rights under Section 1983 or Title VI and, therefore, no standing to sue for protection of those rights. The Board does not challenge the standing of the Knight intervenors. Further, the Board of Trustees of the University of Alabama, as *amicus curiae*, urges that the district court was without jurisdiction to enjoin the state Board and its members since the state of Alabama and its agencies are immune from suit under the Eleventh Amendment to the United States Constitution.

Although the district court did not discuss these issues in the order before us,¹ we may examine our jurisdiction

¹ In its memorandum opinion in the state-wide action, however, the lower court said:

The contention that ASU and A&M are creatures of the State of Alabama and, as such, lack standing to sue the defendants in this case requires little discussion. In *Washington v. Seattle School District No. 1*, 458 U.S. 457 [102 S.Ct. 3187, 73 L.Ed.2d 896] (1982), the Seattle, Washington School Board—no less a creature of the State of Washington than ASU and A&M are creatures of the State of Alabama—sued the State of Washington under the Fourteenth Amendment. There the Supreme Court held that the State

sua sponte. *In Re King Memorial Hosp., Inc.*, 767 F.2d 1508, 1510 (11th Cir.1985). Logic dictates that parties who seek a preliminary injunction in a suit must have standing to bring suit in the first place. Thus, our first inquiry is whether ASU or the Knight intervenors had standing to sue in the original action under either Section 1983 or Title VI. Second, we must decide, since a state agency is the party enjoined, whether the latter enjoys immunity under the Eleventh Amendment.

We agree with appellant that ASU has no standing to sue under either Section 1983 or Title VI. In so doing, however, we cannot accept appellant's broad contention that ASU, as a creature of state government, has no federally protected rights whatsoever under the Constitution or laws of the United States.

A line of Supreme Court cases including, e.g., *Coleman v. Miller*, 307 U.S. 433, 59 S.Ct. 972, 83 L.Ed. 1385 (1939); *Williams v. Mayor and City Council of Baltimore*, 289 U.S. 36, 53 S.Ct. 431, 77 L.Ed. 1015 (1933); *City of Trenton v. New Jersey*, 262 U.S. 182, 43 S.Ct. 534, 67 L.Ed. 937 (1923), and *Hunter v. City of Pittsburg*, 207 U.S. 161, 28 S.Ct. 40, 52 L.Ed. 151 (1907), stands generally for the proposition that creatures of the state have no standing to invoke certain constitutional provisions in opposition to the will of their creator. A former Fifth Circuit case concluded from this authority that "public entities which are political subdivisions of a state" are "creatures of the state, and possess no rights, privileges or immunities independently of those expressly conferred upon them by the state." *City of Safety Harbor v. Birchfield*, 529 F.2d 1251, 1254

had violated the Equal Protection Clause of the Fourteenth Amendment by the challenged legislative action. The dissent by Justice Powell never once suggested that the school board lacked standing to bring the lawsuit. Further, in the view of the court, *Monell v. NYC Dept. of Social Services*, 436 U.S. 658 [98 S.Ct. 2018, 56 L.Ed.2d 611] (1978), makes it clear that as bodies corporate, ASU and A&M are "persons" within the meaning of 42 U.S.C. § 1983.

(5th Cir.1976). However, the latter interpretation—which would bar any suit by a creature of the state against its creator—has not prevailed in this Court.

A subsequent Fifth Circuit decision binding on this Circuit has reviewed the Hunter line—including *Safety Harbor*, *supra*—and concluded that “these cases are substantive interpretations of the constitutional provisions involved; we do not think they hold that a municipality never has standing to sue the state.” *Rogers v. Brockette*, 588 F.2d 1057, 1068 (5th Cir.1979), *cert. denied*, 444 U.S. 827, 100 S.Ct. 52, 62 L.Ed.2d 35 (1979). The Fifth Circuit panel relied in part on the Supreme Court’s statement in *Gomillion v. Lightfoot*, 364 U.S. 339, 344, 81 S.Ct. 125, 128, 5 L.Ed.2d 110 (1960), that “a correct reading of the seemingly unconfined dicta of *Hunter* and kindred cases is not that the state has plenary power to manipulate in every conceivable way, for every conceivable purpose, the affairs of its municipal corporations, but rather that the state’s authority is unrestrained by the particular prohibitions of the constitution considered in those cases.” *Id.*

Thus, no per se rule applies in this Circuit.² In assessing the standing to sue of a state entity, we are bound by the Supreme Court’s or our own Court’s determination of

² Cf. *City of South Lake Tahoe v. California Tahoe Regional Planning Agency*, 449 U.S. 1039, 1042, 101 S.Ct. 619, 621, 66 L.Ed.2d 502 (1980) (White, J., dissenting from denial of certiorari). Justice White indicated that a per se rule prohibiting a political subdivision from raising constitutional objections to the validity of a state statute was inconsistent with *Board of Education v. Allen*, 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968), in which one of the appellants was a local board of education.

But see *City of New York v. Richardson*, 473 F.2d 923, 929 (2d Cir.1973); P. Bator et al., *Hart and Wechsler’s The Federal Courts and the Federal System* (2d ed.) 182 (1973), in which a per se rule is contemplated. See also *Aguayo v. Richardson*, 473 F.2d 1090, 1100 (2d Cir.1973), *cert. denied*, 414 U.S. 1146, 94 S.Ct. 900, 39 L.Ed.2d 101 (1974), for an indication of the confusion surrounding this issue.

whether any given constitutional provision or law protects the interests of the body in question. However, if no such determination has been made, it is our task to review de novo whether the state entity has any rights under the particular rule invoked.

In the instant case, the law is clear that ASU, as a creature of the state, may not raise a Fourteenth Amendment claim under Section 1983.³ As long ago as 1939, the Supreme Court in *Coleman, supra*, 307 U.S. at 441, 59 S.Ct. at 976 (1939) (dicta), indicated that "[b]eing but creatures of the State, municipal corporations have no standing to invoke the contract clause or the provisions of the Fourteenth Amendment of the Constitution in opposition to the will of their creator." See also *Town of Ball v. Rapides Parish Police Jury*, 746 F.2d 1049, 1051 n. 1 (5th Cir.1984). ASU argues, however, that since the Supreme Court has more recently determined that municipalities and other local governing bodies are "persons" who may be sued under Section 1983, *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690, 98 S.Ct. 2018, 2035, 56 L.Ed.2d 611 (1977), they are logically also persons who may bring suit under this section. The former Fifth Circuit, however, has squarely rejected this argument:

The Supreme Court's holding in *Monell* is that by enacting 42 U.S.C. § 1983, Congress intended to make municipalities and other political subdivisions amenable to suits brought under that section. The *Monell* decision does not call into question the principle that a city or county cannot challenge a state statute on federal constitutional grounds.

³ By its terms, of course, Section 1983 itself creates no substantive rights; it merely provides remedies for deprivations of rights established elsewhere. *City of Oklahoma City v. Tuttle*, ___ U.S. ___, 105 S.Ct. 2427, 2432, 85 L.Ed.2d 791 (1985). Thus, our focus here is directly on Fourteenth Amendment rights.

Appling City v. Municipal Elec. Authority of GA., 621 F.2d 1301, 1308 (5th Cir.1980), *cert. denied*, 449 U.S. 1015, 101 S.Ct. 574, 66 L.Ed.2d 474 (1980).⁴ We are bound by this decision, which extends logically to other creatures of the state such as state universities. ASU thus has no standing to sue or to seek to enjoin the Alabama state board of education under Section 1983 and the Fourteenth Amendment.⁵

⁴ See also *Commonwealth of Pa. v. Porter*, 659 F.2d 306, 327 n. 3 (3rd Cir.1981) (en banc) (standing recognized on other grounds): "[S]tates were never deemed to fall within the class of those for whom Congress created a remedy when it enacted § 1983. . . . Allowing a state to bring suit, against its own instrumentalities and against its own officers, for their alleged violations, under color of state law, of federal rights belonging to the very state which it is suing, turns the statute on its head."

⁵ *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 102 S.Ct.3187, 73 L.Ed.2d 896 (1981), is not inconsistent with this position. There, a local school district challenged on Fourteenth Amendment grounds the constitutionality of a state initiative that sought to end the local school district use of mandatory bussing to achieve desegregation. The Supreme Court did not address the issue of the school board's standing to sue, although Justice Blackmun's opinion for the court did note that "[w]hile appellants suggest that it is incongruous for a State to pay attorney's fees to one of its school boards, it seems no less incongruous that a local board would feel the need to sue the State for a violation of the Fourteenth Amendment." *Id.* at 487-88 n. 31, 102 S.Ct. 3203-04 n. 31.

We are persuaded that *Seattle School District* may be harmonized with the conclusion of this Court that a creature of the state normally has no Fourteenth Amendment rights against its creator. The former Fifth Circuit in *Rogers* explained that the *Hunter* line "adhere[s] to the substantive principle that the Constitution does not interfere with a state's internal political organization." *Rogers, supra*, 588 F.2d at 1070. But *Seattle School District* does not trench on a state's political prerogatives. It simply holds that once a state's political organization is in place, the state may only re-organize that structure (such as a state's delegation of certain educational decision-making powers to local school boards) consistently with the constitutional guarantee of equal protection. See *Seattle School District, supra*, 458 U.S. at 479-82, 102 S.Ct. at 3199-3201.

We turn next to the question of whether ASU has a right to sue the state under Title VI. To our knowledge, no court has decided this issue.⁶ We conclude that no such right of action exists.

Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." 42 U.S.C.A. § 2000d. In *Hardin v. Adams*, 760 F.2d 1158, 1163-64 (11th Cir.1985), *cert. denied sub nom. Grimmer v. Hardin*, — U.S. —, 106 S.Ct. 530, 88 L.Ed.2d 462 (1985), this Court determined that state universities such as ASU are agents or instrumentalities of the state. Nothing in Title VI or its legislative history suggests that Congress conceived of a state instrumentality as a "person" with rights under this statute. Title VI provides for a comprehensive scheme of administrative enforcement, and the Supreme Court has implicitly recognized a private right of action for individuals injured by a Title VI violation.⁷ Absent any indication of Congressional intent to grant additional rights under this statute to non-private state subdivisions against the state itself, we decline to infer such a right of action by judicial fiat.

Our conclusion that ASU has no standing under Section 1983 and Title VI to seek the injunction *sub judice* does

⁶ We note that at least five justices determined in *University of California Regents v. Bakke*, 438 U.S. 265, 287, 98 S.Ct. 2733, 2746, 57 L.Ed.2d 750 (1978), that Title VI proscribes only those racial classifications that would violate the equal protection clause. However, we are not persuaded by this that, because ASU has no Fourteenth Amendment rights, it necessarily has no Title VI rights. The Court's analysis in *Bakke* makes it clear that a decision on Title VI grounds is, nevertheless, distinct from an exercise in constitutional interpretation. *See id.* 438 U.S. at 281, 98 S.Ct. at 2743.

⁷ *See Cannon v. University of Chicago*, 441 U.S. 677, 696-97, 99 S.Ct. 1946, 1957-58, 60 L.Ed.2d 550 (1978).

not end our inquiry. The standing of the Knight intervenors remains unchallenged. Thus, we must next determine whether or not their request for a preliminary injunction against the state board of education or its members is barred by the Eleventh Amendment. We hold that injunctive relief against the Board itself is so barred, but that such relief against Board members in their official capacities is permitted.

Again, we begin our analysis with Section 1983. In general, the Eleventh Amendment bars suits by citizens against a state.⁸ Two exceptions to this rule apply: (1) a state may consent to suit in federal court, and (2) Congress may, under certain circumstances, abrogate a state's sovereign immunity. *Atascadero v. Scanlon*, ___ U.S. ___, 105 S.Ct. 3142, 3145, 87 L.Ed.2d 171 (1985). One further doctrine, first set out in *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), permits state officials to be sued in their official capacities for prospective relief under certain circumstances, despite the Eleventh Amendment bar. See *Kentucky v. Graham*, ___ U.S. ___, 105 S.Ct. 3099, 3106 n. 14, 87 L.Ed.2d 114 (1985).

The instant case does not fall under either of the first two exceptions. Alabama has not consented to suit under Section 1983. *Alabama v. Pugh*, 438 U.S. 781, 782, 98 S.Ct. 3057, 57 L.Ed.2d 1114 (1977) (per curiam). Further, the Supreme Court has held that Congress did not intend Section 1983 to abrogate a state's Eleventh Amendment immunity. *Graham, supra*, 105 S.Ct. at 3107 n. 17; *Quern v. Jordan*, 440 U.S. 332, 99 S.Ct. 1139, 59 L.Ed.2d 358

⁸ The Eleventh Amendment provides that "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890), established that the amendment also proscribes suits by citizens against their own state.

educational station or translator. When more than one noncommercial station or translator qualifies for carriage on a cable system, the cable operator may choose the station or translator to carry. If no qualified noncommercial educational station is located within a 50-mile zone of the cable system's headend and no translator of a noncommercial educational station is located in the cable community, then the system is exempt from must carry obligations.

151. Cable systems with more than 20 usable activated channels, but less than 27 such channels, are required to devote up to 7 channels to the carriage of qualified broadcast signals. Cable systems with 27 or more usable activated channels must devote up to 25 percent of their channel capacity To fulfill their mandatory carriage obligations. For purposes of determining the number of usable activated channels that would be allocated for qualifying must carry signals, calculations should be rounded to the nearest whole number. For example, a system with 44 usable activated channels would not have to devote more than eleven channels to must carry signals (i.e., 25% of 44 is 11.0 or 11 when rounded to the nearest whole number). A system with 46 such channels would be required to devote not more than 12 channels (i.e., 25% of 46 is 11.5 or 12 when rounded). Using this formula, systems with 21 to 29 usable activated channels would have to devote a maximum of 7 channels for must carry signals, those with 30 to 33 channels would have to allocate up to 8 channels, those with 34 to 37 channels would have to devote at most 9 channels, etc. A chart detailing the maximum number of channels that a system must devote to qualified must carry signals is set forth in the rules in Appendix B.

152. Further, cable systems with more than 20, but less than 54 usable activated channels, must allocate at least one must carry channel for the carriage of a qualified noncommercial educational station or translator, if at least

one such station is eligible for carriage. Cable systems with 54 or more usable activated channels must devote at least two of these channels to the carriage of qualified noncommercial educational stations or translators, assuming two or more such stations are available.

153. Where the number of qualified stations is less than or equal to the maximum number of channels that the system must devote to such stations, the cable system will be required to carry all qualified stations. There are two exceptions to this requirement. First, a cable system will not be required to carry duplicating commercial stations. That is, a cable system need not carry more than one station affiliated with the same commercial network. The decision to carry more than one affiliate of the same commercial network will be at the discretion of the cable operator.¹⁰⁸ Further, in cases where both a satellite and its parent television station qualify for carriage, the cable system need not carry both stations and may choose between them. We note that There will be no similar exemption from the carriage of noncommercial educational stations that are affiliated with the same network.¹⁰⁹ However, cable systems will not have to carry a noncommercial station

¹⁰⁸ For example, if a cable system has 25 usable activated channels, it must devote a maximum of 7 channels to stations that qualify for must carry rights. If 2 ABC affiliates, 1 CBS affiliate, 1 NBC station, 2 independents, and 1 PBS station qualify for carriage on this system, then the cable operator would be able to decide whether to carry one or both of the ABC affiliates and must carry each of the other qualified stations.

¹⁰⁹ As commenters have indicated, affiliates of noncommercial educational networks rarely broadcast substantial portions of their programming simultaneously. Therefore, the carriage of more than one noncommercial educational station affiliated with the same network generally adds to viewer choices. However, the Commission will consider granting exemptions to this requirement in those situations where it can be shown that there is a consistently high degree of simultaneous program duplication.

and its satellite or translator station(s).¹¹⁰ Second, a cable system will be permitted not to carry an otherwise qualified station that is considered a distant signal for copyright purposes. This situation could occur because the proposed 50-mile zone in some cases creates over an area that is larger than its rights under the former must carry rules and there is a possibility that a station could qualify for carriage under the revised must carry rules and be considered a distant signal under the Copyright Act. If the system carries a station that is subject to this exception, the system is permitted to count the station in determining whether the system's limit on carriage of qualified stations has been satisfied.

154. Where the number of qualified broadcast stations exceeds the maximum number of channels that a cable system is required to devote to must carry signals, the cable system may choose among the qualifying stations, subject to the requirements for carriage of qualified non-commercial educational stations or translators. There is no requirement that the cable operator select at least one station affiliated with each of the major commercial networks.

155. *Manner of Carriage.* Cable systems will be required to carry qualified broadcast signals that are carried in fulfillment of must carry obligations in their entirety without material degradation, as part of their lowest-priced, separately available tier of service.¹¹¹ By carriage in their entirety, we means that the cable system must carry the primary video and accompanying audio transmissions of all

¹¹⁰ Similarly, a cable system will not have to carry two or more translator or satellite stations that duplicate the same parent station.

¹¹¹ However, the rules relating to the requirement that programs on distant signals be carried in full, but that entire signals need not be carried in full, were not the subject of this proceeding and, therefore, remain unchanged. See 47 CFR 76.55(b). This section of the rules is being recodified as §76.62(a), pursuant to our decision herein.

programs in full, without deletion or alteration. Retransmission of any ancillary services in the vertical blanking interval or aural baseband, including but not limited to multichannel television sound and teletext, will be at the discretion of the cable operator. The rules do not require a cable system to provide onchannel carriage of any qualified station. A cable operator may carry qualified broadcast stations on any channel or frequency, so long as those carried in fulfillment of any must carry obligation are carried on the lowest-priced, separately available tier of service offered by the cable system.

156. Changes in the network nonduplication rules were not a part of this proceeding and are not being changed substantively herein.¹¹² As a consequence of this, situations may arise in which signals that are defined as "qualified" for mandatory carriage under the transitional must carry rules may be subject to partial deletion under the network nonduplication rules. The rules specifically account for this possibility. In this respect, cable systems will not be required to extend network nonduplication protection to qualified stations that they are otherwise not required, and choose not, to carry.

157. Cable systems will be prohibited from accepting any payment or other consideration from qualified stations carried in fulfillment of must carry obligations with two limited exceptions.¹¹³ First, qualified stations carried to fulfill must carry requirements will be allowed to reimburse a cable operator for any copyright fees associated with the station's carriage. Second, such broadcast stations will be permitted to pay any costs related to the requirement that they deliver a good quality signal to the cable system's

¹¹² See 47 CFR 76.92-99.

¹¹³ This prohibition does not apply to nonqualified stations or those otherwise qualified stations that are carried but whose carriage does not serve to fulfill must carry obligations because there are an excess number of qualified signals in the market.

headend, including the cost of installing additional receiving or transmitting equipment and of using CARS or common carrier microwave links. We recognize that the requirements stated in this paragraph are different from those proposed in the industry agreement.

158. A broadcast station seeking carriage as a qualified must carry signal will bear the burden of establishing this right. A broadcaster that believes its station is qualified for mandatory carriage rights must submit a request for carriage in writing to the cable operator and include sufficient evidence to demonstrate that its station meets the criteria set forth in the rules. Within 30 days of receiving a request for carriage, a cable operator must provide the broadcaster with a written response. If the cable system declines carriage of the requesting station, it must give a brief statement of the reasons for its decision. A cable system that refuses a request for carriage, but complies in good faith with these requirements, will not be subject to any forfeiture or other penalty if it is later determined that the station is entitled to carriage.¹¹⁴

159. In general, we are hopeful that broadcasters and cable operators will be able to determine carriage rights without the intervention of the Commission. However, in instances where the broadcast station and the cable system cannot agree on the station's must carry rights, the broadcast station requesting carriage may petition the Commission for a determination of its rights. The petitioning station will bear the responsibility of convincing the Commission that it satisfies the mileage and viewership standards and that the cable system is not otherwise carrying its limit of qualified television stations. Where a cable operator refuses to carry a station on the ground that the station does not deliver a good quality signal to the sys-

¹¹⁴ If a new station is involved, the 12-month exemption from the audience share requirement will not run during the period of dispute resolution if the station is not being carried.

tem's headend, the station will bear the burden of proving with appropriate engineering data that it meets this requirement. If the Commission determines that a station is entitled to carriage, it will then order the cable system to add the station. A cable system may be assessed a forfeiture or other penalty for failure to comply with a Commission order to carry a qualified broadcast station. Commission action in such cases will also include action by the Mass Media Bureau under delegated authority.

The New Rules Meet the Need for Regulation

160. The new regulatory program we are adopting is intended to protect and further the federal interest in maximizing consumers' viewing choices. The first objective of this plan is to alter the manner in which consumers have permitted their independent access to off-the-air broadcast signals to be limited once they subscribg to cable. Consumers who can receive signals both via cable and off their antennas will have their program choices maximized. We, therefore, seek to prohibit cable Systems from diminishing the off-the-air reception capability of new subscribers, and to require them to aid existing subscribers in regaining their off-the-air reception capability. To this end, consumers will be educated on the need to maintain the capability To receive broadcast signals independent of their cable system, will be instructed as to how to do this, and will receive an input selector switch to enable them to connect an antenna in conjunction with their cable service.

161. We have determined that a requirement for cable systems to offer an input selector switch and consumer information to their subscribers is warranted as the appropriate long-term policy to ensure that viewers retain both the awareness and capability to receive signals off-the-air. We find that rules enhancing the availability of input selector switches to viewers and the dissemination of information concerning their need and purpose will help

attain the important governmental interest of maximizing the program choices available to the public. In this regard, the maximization of cable subscribers' program choices is furthered by ensuring the opportunity to receive all off-the-air broadcast signals as well as cable offerings. Indeed, their choices are then increased if not all off-the-air signals are duplicated on cable, but, rather, cable channels are freed up for other programming that viewers are unable to receive off-the-air. The capability to receive signals directly off-the-air, which will be facilitated by these switches, also is beneficial in that it will preserve subscribers' ability to receive broadcast signals in the event of outages of cable service and will provide a means for access to ancillary services, such as teletext, that may not be carried by the cable system.¹¹⁵

162. Noncable subscribers' viewing choices also will be substantially enhanced to the extent that cable subscribers use input selector switches to access all off-the-air broadcasting, thereby increasing broadcast station audiences and revenues. In addition, even rural viewers who must rely on television receive only (TVRO) satellite equipment will have their viewing choices substantially enhanced by this requirement, as increased cable channel capacity for satellite programmers can be expected to provide a spur to the economic market of such programmers, thereby increasing the likelihood that additional satellite programming will be developed.

163. We are confident that the switch requirement, coupled with the consumer education program, will ensure that all cable subscribers become aware of the need for

¹¹⁵ In light of both our prior determination that services on the VBI and the aural baseband are secondary in nature and our recognition of cable operators' First Amendment rights, we believe it is not appropriate to require carriage of these signals. See *Report and Order* in MM Docket 84-168, 50 FR 4658 at para. 10 (1985); see also *Second Report and Order* in Docket No. 21233, 49 FR 18100 at para. 25 (1984).

off-the-air reception capability and have the opportunity to acquire such capability. In this respect, our previous concerns that input selector switches would be inconvenient and? therefore, not used by consumers, no longer appear valid in the context of the search for acceptable solutions that are minimally intrusive on cable operators' editorial discretion in the post-*Quincy* environment. We are convinced that once cable subscribers become accustomed to using off-the-air reception on an equal basis with cable service, then cable systems no longer will have an artificial ability to limit their subscribers' access to over-the-air broadcast signals.

164. There is evidence that video consumers are now becoming accustomed to switching between alternate program input sources. We observe that many cable systems now offer services through dual cables in order to provide greater channel capacity.¹¹⁶ Such systems employ switching devices to select between the two cables and often mark the switch positions with "A" and "B" designations. Cable subscribers apparently have accepted this switching arrangement and do not find it inconvenient. In addition, cable systems operating with two cables often provide their subscribers with remote control converter devices that permit selection of the cable as well as the channel to view.¹¹⁷ We note that consumers also have become familiar with switching between alternative program sources through use of VCRs. We believe that switching between cable and off-the-air reception is essentially the same as these existing program source switching options and that consumers will accept cable/broadcast input switching as simply another program source option. We have no evidence that cable

¹¹⁶ All cable systems offering more than 609 channels of service use dual cable operation.

¹¹⁷ Converter devices that provide for remote switching between "A" and "B" cables are now being manufactured by Zenith Radio Corp. and Jerrold Division, General Instruments Corp.

subscribers will not accept such a result where the alternative is a regulatory regime that infringes on cable operators editorial discretion. Indeed, it was exactly this kind of assumption that led the court in *Quincy* to strike down our former rules.

165. We are aware that some broadcasters are concerned that input selector switches would not be a satisfactory means for ensuring that cable subscribers have independent access to broadcast stations. We believe that many of these concerns are overstated and that the rest can be mitigated or resolved by development and improvement of new and existing input selector switches to meet particular needs. We decline to reject a solution which we have concluded will achieve our goal in a manner that is least intrusive on editorial discretion and that is conducive to maximization of viewer program choice on the basis of minor technical considerations that can be resolved through equipment redesigns. In the past, there has been no incentive to develop input selector switches to meet a variety of different technical demands because few consumers had reason to use such devices. Our recognition that there may be room for improvement in the technology of input selector switches is, however, one of the reasons why we are continuing our interim must carry rules for five years.

166. Broadcasters argue that input selector switches would not provide effective off-the-air reception because very few cable subscribers have maintained outdoor antennas and local regulations and/or multi-unit residences in many cases preclude installation of such antennas. Our five-year interim rules are specifically designated to ensure access to local broadcasting in the period before it can be reasonably expected that subscribers can regain their off-the-air accessibility. The relatively low cost and simple installation of indoor antennas can be expected to make it easy for cable subscribers to acquire the capability to receive broadcast stations not carried on cable. The argument that outdoor antennas are sometimes prohibited

ignores the fact that in many of these situations it is possible to receive signals of acceptable quality using an inexpensive indoor, set-top antenna. This is particularly the case where subscribers are located within the Grade A signal of the station. While indoor antennas would not prove satisfactory in all such cases, we believe their use can significantly mitigate the antenna availability problem. Attic antennas which can give additional off-the-air reception capability are also available. The consumer education program required under the new rules will encourage cable subscribers to acquire and maintain antennas for off-the-air reception of television signals, be they of outdoor, attic, or indoor designs.

167. As broadcast commenters observe, use of input selector switches in conjunction with VCRs may pose installation complexities and in some cases may require use of additional equipment. We believe that any equipment compatibility problems can be overcome through relatively minor modifications to switching devices and that cable operators and other equipment suppliers can provide the information and/or assistance consumers may need to install the switches for use with VCRs. We also believe that the problems with respect to use of input selector switches in conjunction with cable-ready receivers can be overcome through proper matching of the switches with the input requirements of the receivers. We note further that many of these concerns may become moot if television receivers begin to be manufactured with switching or interface devices built in.

168. We also recognize broadcasters' arguments that many cable operators now encourage subscribers to disconnect their antennas and/or offer to assist in removing them. We consider this practice to be inconsistent with our federal objectives and, therefore, are including provisions in the new rules to require cable operators to inform their subscribers that an antenna may be necessary to receive broadcast television services and to prohibit them

from promoting abandonment of off-the-air reception capability.

169. In order to achieve the long-term of maximizing program choices to all viewers, we need to preserve cable subscribers' access to broadcast programming and to ensure that broadcast television remains a competitive alternative source of programming during the transition to the new environment. The interim must carry rules will meet this objective by preventing disruption of the flow of television services to the public during a five-year implementation period and by facilitating an orderly transition to a new market environment in which must carry regulation is no longer necessary because consumers have both the awareness and capability to use switching devices to alternate between cable and broadcast program sources.

170. As discussed above, preservation of commercial broadcasting as a competitive alternative source of programming during the transition to an environment without must carry rules is essential to The federal interest of maximizing program choices to all viewers. In this regard, we believe that the 50-mile zone/viewing standard formula for defining the qualified status of commercial stations will ensure that viewers have access to the most popular stations available off-the-air in the cable community. In addition, the exemption from the viewing standard for commercial stations that have been on-the-air for less than one year affords new stations an opportunity to gain a foothold in the market. Thereby furthering our interest in maximizing program choices by fostering entry into the market. On the other hand, the interim must carry rules will provide cable systems with opportunity to tailor their program service offerings to viewer preferences. In this respect, the rules limit the portion of a cable system's available channel space that is to be devoted to mandatory carriage of broadcast signals in a manner that will permit all cable operators with opportunity to provide programming from other sources.

171. While we recognize that to exempt cable systems with 20 or fewer channels from any obligation to carry commercial stations does not serve to further our goal of protecting the broadcast service during the transition period, we nonetheless believe that this is necessary in view of the strong constitutional concerns that must be balanced against any must carry regulation. However, we do not expect that this exception will substantially affect the achievement of the objectives of our transition policy. In this regard, we note that at this time, only 31 percent of all cable systems, serving 23 percent of all subscribers, have less than 20 channels.¹¹⁸ We expect that these proportions will decrease during the five-year period as these generally older cable systems respond to consumer demand for additional program services and rebuild using state-of-the-art equipment. We also believe that the provision for proportional increases in signal carriage requirements for larger cable systems based on their individual channel capacity and the exemption from required carriage of duplicate network signals adequately balances the need to ensure an orderly transition to a new environment without must carry rules with the need to protect the cable operators' opportunities for exercising their editorial discretion.

172. We also have modified the industry agreement to provide mandatory carriage protection for noncommercial educational stations. We recognize that some cable systems with 20 or fewer channels may consider it an imposition to carry one noncommercial station. However, the federal interest in ensuring the continued accessibility to and availability of the alternative programming provided by noncommercial educational stations is sufficiently important to warrant the imposition of such a requirement in the interim period. In this respect, we believe that the public

¹¹⁸ "1985 Television and Cable Factbook," Cable and Services Volume No. 53, at 1385.

interest Value of noncommercial educational broadcasting justifies requiring cable systems with 54 or more channels to carry at least two qualified noncommercial broadcast or translator stations. The provision for carriage of noncommercial translators, as proposed by Senator Danforth, will ensure the availability of noncommercial television service to cable subscribers in areas unable to support a full service station. In view of the proportional manner in which this requirement is imposed, which is similar to the requirement concerning carriage of commercial broadcast stations, we believe that here too we have struck an appropriate balance between the competing needs to provide access to noncommercial educational programming and to protect cable operators' opportunities for exercising their editorial discretion during the five-year interim period.

Alternative Proposals Considered and Rejected

173. In developing our policy decision in this matter, we considered a wide range of policy options, including the various proposals submitted by the petitioning and commenting parties in this proceeding. We have incorporated many of the specific features of these proposals, or modifications thereof, into the new rules. However, we also have rejected many other proposals on the grounds that they would exceed our statutory authority, would be overly intrusive on cable operators' editorial discretion, or simply would not meet our regulatory objectives as well as the plan we have chosen. In order to provide additional insight into our policy decision, we believe it is useful to indicate our reasons for rejecting the major alternatives presented in the record.

174. One alternative approach, proposed by Richard Leghorn, with respect To the input selector switch requirement, would be to require that all new television receivers be built with integral switches for selecting between cable and off-the-air television service. The attractive feature of this approach is that it would assure that, over

time, all viewing households would have the capability to switch between cable and off-the-air service without The need fore a requirement that a switch be provided by the cable system. However, we have rejected this option on the basis that it is ultimately an inefficient means to distribute input selector capability. The need for cable/broadcast input selector capability pertains only to those consumers that subscribe to cable service; noncable subscribers have no need for such capability. We see no need to impose the additional cost of a built-in selector switch on consumers who have no need or desire for it.¹¹⁹ Thus, we do not find it desirable to require all receivers to be built with a feature intended for use by only approximately one half of the TV households nationwide. In addition, cable subscribers purchasing cable-ready receivers may prefer a more sophisticated independent stand-alone input selector device, and thus, not have need for such capability to be built into their receiver. In view of these considerations, we believe that market forces are the most appropriate means to lead the television receiver industry to produce sets equipped with capability to switch between cable, broadcast, and other program sources. In this respect, market forces will determine both the number of sets to be equipped with input selector features and the specific design of those features.

175. As described above, Mr. Leghorn also proposes to exempt cable systems from requirements to provide input selector switches to their subscribers if they carry all local VHF signals. This proposal is attractive in that it would provide a way to minimize the impact of our new program on the cable industry without significantly altering the mix of services offered by individual cable systems from that

¹¹⁹ In this respect, we recognize that the costs of the input selector switches that cable systems will be required to provide under the new rules are likely to be borne ultimately by cable subscribers through higher service rates.

which could be expected to obtain under the plan we have chosen. In this respect, we observe that most cable systems already carry all of the local VHF stations, and because these stations are generally popular with viewers, would continue to so in the absence of regulation. However convenient this approach might be for both the cable and broadcast industries, it nonetheless would be directly contrary to our stated goals to correct the misperception that has resulted from our former must carry rules and to provide a regulatory environment that will maximize viewers' access to video programming. To provide regulatory encouragement for cable systems to carry all of the local VHF stations would tend to perpetuate the misperception that it is not necessary for cable subscribers to maintain independent off-the-air reception capability. Such a policy also would hinder the attainment of our program access goals by providing a strong incentive for cable systems to devote a portion of their channel package to a fixed package of services rather than encouraging them to tailor their service directly to viewer interests. We also observe that carriage of all VHF signals would not ensure access to all of the available off-the-air signals for subscribers using cable ready receivers because such receivers generally disable their UHF antennas when operated in the cable ready mode. Finally, a policy that offered strong incentive to cable systems to carry all of the local VHF signals would operate in a manner much the same as our former must carry rules and thus would impose the same type of overintrusive, nondiscriminatory regulatory protection ruled constitutionally unacceptable by the court in the *Quincy* decision.

176. The proposals of NTVE and Grace Cathedral would provide strong incentives for cable systems to carry broadcast stations by conditioning the availability of the cable compulsory copyright license on carriage of all local stations. Similarly, CBS's proposal to require cable systems to obtain retransmission consent from originating stations,

except from local stations where all such stations are carried, potentially would conflict with the cable compulsory copyright license. Regardless of our authority in this area, an issue which we need not reach here, the NTV, Grace, and CBS proposals would reimpose broad must carry rules that would be difficult to sustain under the *Quincy* decision. Therefore, as a policy matter, we find these proposals unacceptable.

177. Other proposals for new must carry rules, such as those submitted by the Catholic Conference and UCC, attempt to meet the constitutional concerns of the *Quincy* court by extending carriage rights only to limited classes of local television stations that they believe are a risk or that offer specific kinds and/or amounts of local program service. These proposals are designed to protect certain classes of local broadcast stations and to further local broadcast television service consistent with our previous cable signal carriage policy. They are not well suited to the current need for must carry rules during the transition to the new regulatory environment and would, in fact, tend to hinder rather than promote viewer access to the maximum program choices in the interim period. In this respect, policies that promote the carriage of specific types of programming generally hinder a cable system from carrying the services its subscribers most desire to watch. Such regulation also is more intrusive on cable operators editorial discretion than the rules we are adopting.

178. We find that the proposal to reimpose restrictions on cable carriage of distant broadcast signals in larger markets submitted by Henry Geller and Donna Lampert in their petition for rule making filed subsequent to the *Quincy* decision¹²⁰ raises issues generally outside the scope of this proceeding. We intend to address the distant signal and syndicated exclusivity issues in future proceedings.

¹²⁰ See Notice at footnote 6. .

179. Finally, we do not believe that it is appropriate at this time to eliminate the existing network nonduplication rules as proposed in the industry agreement. This proceeding is focused on the mandatory signal carriage rules and, therefore, is not an appropriate forum for addressing whether the network nonduplication rules should be retained or eliminated. As discussed below, we intend to initiate a separate proceeding to fully address the issues in the network nonduplication matter.

CONSTITUTIONAL AND STATUTORY CONSIDERATIONS First Amendment Issues

180. *Standard of Review.* The threshold issue in reviewing the constitutionality of any mandatory carriage requirement is the appropriate standard of review. While the United States Supreme Court has expressly recognized that cable television operators engage in conduct protected by the First Amendment,¹²¹ it has not definitively addressed the appropriate standard¹²² to be utilized in evaluating the constitutionality of cable regulation.¹²³ In the

¹²¹ *City of Los Angeles and Department of Water and Power v. Preferred Communications, Inc. (Preferred)*, 106 S.Ct. 2034, 2035 (1986).

¹²² While the issue has been raised by the parties in several cases, the Supreme Court has never resolved the issue concerning the applicable First Amendment standard governing cable television. See *Preferred, id.*; *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984); *Midwest Video Corp. v. FCC*, 440 U.S. 689, 709 n.19 (1979).

¹²³ Certain parties in this proceeding have urged the Commission to employ a functional analysis of the particular aspects of cable service in assessing the First Amendment implications arising from reimposition of a mandatory carriage requirement. While acknowledging that the program origination functions of cable operators qualify for full First Amendment protection, these parties argue that the First Amendment rights of cable operators, in performing the function of retransmitting local broadcast signals, are either minimal or nonexistent. See, e. g., *Comments of National Broadcasting Co. (filed Jan. 29, 1986)*. The

absence of explicit Supreme Court guidance, the lower federal courts have employed divergent tests and the matter remains unsettled.

181. Several appellate courts have determined that there are special characteristics of cable television which warrant the application of a special standard of scrutiny that differs from and is lower than the one governing the print media. For example, in *Omega Satellite Products Co. v. City of Indianapolis* (Omega Satellite),¹²⁴ the Seventh Circuit applied a lower standard of scrutiny analogous to the one applied to broadcasting services,¹²⁵ in reviewing the constitutionality of cable regulation. The court articulated three reasons for rejecting the print model as the appropriate standard of review. First, while noting that spectrum scarcity does not exist for cable services, the court stated that "cable television involves another type of in-

United States Supreme Court recently stated, however, that cable operators "through original programming or by exercising editorial discretion over which stations to include in its repertoire . . . implicate first amendment interests." Preferred, 106 S.Ct. at 2035. Thus, not only did the Court indicate that both the programming and retransmission functions of a cable operator are entitled to First Amendment protections, but in so stating the Court made no distinction as to the quantum of protection afforded to the operator on the basis of whether it performs an origination or retransmission function. See also *Omega Satellite Products Co. v. City of Indianapolis* (Omega Satellite), 694 F.2d 119, 127 (7th Cir. 1982) (cable system "engaged in the dissemination of speech within the meaning of the First Amendment, both by transmitting programs originated by television stations and cable television networks and by originating its own . . . programs."); *Telecommunications of Key West, Inc. v. United States*, 757 F.2d 1330, 1336-37 (D.C. Cir. 1985) ("Whether or not TCI [the cable operator] produces any original programming of its own, its activities of transmitting and packaging programming mandate that it receive First Amendment protection."); *Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 610 F. Supp. 891, 898 (W.D. Mo. 1985), *aff'd* 800 F.2d 711 (8th Cir. 1986).

¹²⁴ 694 F.2d 119 (7th Cir. 1982).

¹²⁵ See, e. g., *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

terference — interference with other users of telephone poles and underground ducts.”¹²⁶ Second, it determined that there were “apparent natural monopoly characteristics of cable television”¹²⁷ which justified the application of a different lower standard of scrutiny. Third, citing *FCC v. L Pacifica Foundation* (Pacifica),¹²⁸ a case involving traditional broadcasting services, the court indicated that “the universal access to the home that television enjoys and a resulting felt need to protect children”¹²⁹ warranted application of a lower constitutional scrutiny standard.

182. Similarly, the Tenth Circuit, in *Community Communications Company v. City of Boulder Colorado*,¹³⁰ expressly determined that “[t]he attributes of cable broadcasting technology”¹³¹ justify the application of a distinct and more relaxed standard¹³² in assessing the constitutionality of cable regulation than is employed in evaluating governmental restrictions on the press.¹³³ In

¹²⁶ *Omega Satellite*, 694 F.2d at 127.

¹²⁷ *Id.*

¹²⁸ U.S. 726 (1978).

¹²⁹ *Omega Satellite*, 694 F.2d at 128.

¹³⁰ 600 F.2d 1370 (10th Cir. 1981), *cert. dismissed*, 456 U.S. 1001 (1982).

¹³¹ 660 F.2d at 1377.

¹³² While the Tenth Circuit explicitly determined that it was inappropriate to utilize the strict First Amendment standard of review governing the regulation of the press in cases involving cable regulation, it declined to address whether “the full panoply of principles governing the regulation of wireless broadcasters necessarily applies to cable operators.” *Id.* at 1379.

¹³³ The Tenth Circuit was persuaded that two characteristics of cable television distinguished it from the print media. First, in contrast to the manner in which a newspaper disseminates its message, the court stated that:

a cable operator must lay the means of his medium underground or string it across poles in order to deliver his message. Obviously, this manner of using the public domain entails significant disrup-

applying a lenient standard, the Tenth Circuit indicated that governmental regulation could be justified in order to assure "that optimum use is made of the cable medium in the public interest."¹³⁴

tion especially to streets, alleys, and other public ways. Some form of permission from the government must, by necessity, precede such disruptive use of the public domain.

Id. at 1377-78. Second, the court stated that "the physical and economic limitations on the number of cable systems that can practicably operate in a given geographic area" differentiate cable from the press. *Id.*

¹³⁴ *Id.* at 1379. Other federal courts have also adopted a lenient constitutional standard. In *Hopkinsville Cable TV v. Pennyroyal Cablevision, Inc.*, 562 F. Supp. 543 (W.D. Ky. 1982), a district court held that a cable system is a "natural monopoly" which justifies the award of an exclusive franchise by a municipality. *But cf. Carlson v. Village of Union City, Michigan*, 601 F. Supp. 801 (W.D. Mich. 1985), in which another district court in the Sixth Circuit applied the balancing test prescribed in *United States v. O'Brien (O'Brien)*, 391 U.S. 367 (1968).

Perhaps the opinion applying the most lenient standard of review to cable regulation is *Black Hills Video Corp. v. FCC*, 399 F.2d 65 (8th Cir. 1968), in which the Eighth Circuit, expressly extending the "physical scarcity" rationale to cable Television, explicitly applied the lenient broadcast standard in upholding the constitutionality of a number of cable regulations, including mandatory carriage rules. While the Eighth Circuit has never expressly repudiated *Black Hills Video*, nonetheless it is unclear that *Black Hills Video* continues to reflect the law in the circuit. In *Midwest video Corp. v. FCC*, 571 F.2d 1025 (8th Cir. 1978), *aff'd on other grounds*, 440 U.S. 689 (1979), the Eighth Circuit virtually ignored its earlier decision, and in dicta, appeared to endorse a more stringent constitutional standard for cable television. In light of *Midwest Video*, at least one court has concluded that *Black Hills Video* "is a doubtful precedent today." *Preferred Communications v. City of Los Angeles*, 754 F.2d 1396, 1404 (9th Cir. 1985), *aff'd on other grounds sub nom. City of Los Angeles and Department of Water and Power v. Preferred Communications, Inc.*, 106 S.Ct. 2034 (1986). Further, a district court in the Eighth Circuit has recently applied a standard of review which appears to be inconsistent with the 1968 *Black Hills Video* decision. *Central Telecommunications v. TCI Cablevision, Inc.*, 610 F. Supp. 891 (W.D. Mo. 1985), *aff'd* 800 F.2d 711 (8th cir. 1986).

183. More recently, other federal circuit courts have expressly repudiated the notion that there are specific attributes of cable television which would warrant use of a lower constitutional standard of scrutiny. For example, in applying generally applicable First Amendment standards for cable television, the District of Columbia Circuit in *Quincy Cable TV, Inc. v. FCC (Quincy)*¹³⁵ emphasized that a "fundamental significant"¹³⁶ distinction between broadcasting and cable is that the former is subject to the physical limitations of the electromagnetic spectrum.¹³⁷ Emphasizing that "the 'scarcity rationale' has no place in evaluating government regulation of cable television"¹³⁸ and that "the analogy to more traditional media is compelling,"¹³⁹ the court concluded that the broadcast standard of scrutiny was inapposite in evaluating the constitutionality of cable regulations. The court found unpersuasive arguments that the alleged natural monopoly characteristics of cable television¹⁴⁰ of the potential disruption at-

¹³⁵ *Quincy*, *supra*, n.2.

¹³⁶ *Id.* at 1448.

¹³⁷ The United States Court of Appeals for the District of Columbia Circuit has consistently rejected the application of a broadcasting standard to cable television on the grounds that spectrum scarcity does not exist in the context of cable television. For example, nine years ago, in *Home Box Office, Inc. v. FCC*, 567 F.2d 944-45 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1977), the District of Columbia Circuit expressly stated that the traditional First Amendment standard applied to broadcasting services "cannot be directly applied to cable television since an essential precondition of that theory—physical interference and scarcity requiring an umpiring role for government—is absent."

¹³⁸ *Quincy*, 768 F.2d at 1449.

¹³⁹ *Id.* at 1450.

¹⁴⁰ The court set forth three reasons for this conclusion. First, it expressed skepticism, as a factual matter, that cable operators are in an economic "position to exact monopolistic rents." *Id.* Second, it asserted that "the tendency toward monopoly, if present at all, may well be attributable more to governmental action—particularly the municipal

tendant upon stringing coaxial cable in a public right of way would justify use of a lenient standard of review.¹⁴¹ The Ninth Circuit, in *Preferred Communications, Inc. v. City of Los Angeles*,¹⁴² has also recently rejected the application of the lower broadcasting standard of scrutiny to cable television for many of the same reasons articulated by the District of Columbia Circuit.

184. Given the unsettled nature of the law in this area, as reflected in the cited judicial opinions, there is no single standard absolutely compelled by case precedent. Nonetheless, we find persuasive the more recent court analyses which conclude that cable's First Amendment rights are subject to a stringent review, rather than the relaxed review used by courts for broadcasting.¹⁴³ We do not find

franchising process—than to any 'natural' economic phenomenon." *Id.* Third, each assuming, *arguendo*, the existence of the "natural monopoly" characteristics of cable television, the court was unpersuaded that purely economic constraints on the number of voices available in a given community would justify the constraints upon First Amendment freedoms. *Id.*

¹⁴¹ In this regard, the court stated That:

[t]he potential for disruption inherent in stringing coaxial cables above city streets may well warrant some governmental regulation of the process of installing and maintaining the cable system. But hardly does it follow that such regulation could extend to controlling the nature of the programming that is conveyed over that system.

Quincy, 768 F.2d at 1449.

¹⁴² *Supra* n.132.

¹⁴³ Because cable systems do not directly utilize the electromagnetic spectrum, the traditional justification for the application of a lower standard in evaluating the constitutionality of broadcast regulation—spectrum scarcity—simply does not apply to cable television. The three federal circuit courts addressing this issue in the past two years have employed a stricter First Amendment test in assessing the constitutionality of cable regulation. *Quincy*, *supra*; *Preferred*, *supra*; *Cruz v. Ferre*, 755 F.2d 1415 (11th Cir. 1985). Recent district court decisions

that the rationales for applying a lower First Amendment scrutiny standard analogous to that adopted for broadcasting in *Red Lion Broadcasting Co. v. FCC*,¹⁴⁴ are persuasive or are sufficiently likely to prevail on review that regulations should be based thereon.¹⁴⁵

185. Rejecting a lower standard of scrutiny based upon the allegedly "unique" characteristics of cable television does not decide the issue of whether the rules adopted in this proceeding comply with the First Amendment.¹⁴⁶ In determining whether or not a governmental regulation comports with the strictures of the First Amendment, the courts have differentiated between governmental actions imposing incidental burdens on speech and those which are content-based. Whereas the former are assessed under the balancing standard enunciated in *United States v. O'Brien*

have also enunciated constitutional tests which carefully scrutinize governmental actions affecting the First Amendment rights of cable operators. *Community Television of Utah, Inc. v. Wilkinson*, 611 F. Supp. 1099 (D. Utah 1985), *aff'd sub nom. Jones v. Wilkinson*, 800 F.2d 989 (10th Cir. 1986). See generally *Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, *supra* n.101. See *Carlson v. Village of Union City, Michigan*, *supra* n.132.

¹⁴⁴ *Supra* n.123.

¹⁴⁵ Indeed, as the court in *Quincy* noted,

[T]echnological advances may have rendered the "scarcity rationale" obsolete even for broadcasters. . . . [And while] [t]he Supreme Court recently suggested . . . that it was not prepared to reconsider its "long-standing approach" to the broadcast medium. . . . it made clear that [a] law . . . would receive far more exacting scrutiny if it were directed at non-broadcast speech.

Quincy, 768 F.2d at 1449, n.32 (citations omitted).

¹⁴⁶ As the District of Columbia Circuit recognized in *Quincy*, such a determination by itself "does not, of course, suggest that the First Amendment interposes an impermeable bulwark against any regulation."

Quincy, 768 F.2d at 1450.

(O'Brien),¹⁴⁷ content-based regulations are subject to a far more stringent standard.¹⁴⁸ Before the constitutional permissibility of the mandatory carriage regulations we adopt today can be assessed, therefore it must be determined which standard is applicable.

186. The *Quincy* court acknowledged that the Commission's former must carry rules were not intended to suppress or protect any particular viewpoint. *Quincy*, slip op. at 35.; Nevertheless, the Court "had serious doubts" whether the rules should be evaluated under the *O'Brien* standard because of the nature of the First Amendment intrusions they effected. The court focused on the rules' effect on cable operators' editorial autonomy and noted that they were designed to favor one group of speakers (local broadcasters) over another (cable programmers). The Court was especially concerned that, in systems substantially occupied by mandatory signals, cable programmers are shut out entirely from the only forum capable of carrying their programming, *Id.* at 36, "even if that result directly contravenes the preference of cable subscribers." *Id.* at 39.

¹⁴⁷ *Supra* n.132.

¹⁴⁸ See e.g. *Miami Herald Publishing Co. v. Tornillo* (*Miami Herald*) 41 U.S. 241 (1974). As the court in *Quincy* stated, certain content-based regulations appear to be impermissible *per se*:

[I]f *Miami Herald* supplies the appropriate mode of First Amendment analysis, our inquiry would be at an end without any need for testing against the other *O'Brien* factors or applying any other form of interest balancing. In *Miami Herald* . . . [w]ithout so much as alluding to even the possibility of a subordinating governmental interest, the Court invalidated the statute.

Quincy, 768 F.2d at 1453 (footnotes omitted). Other supreme Court cases, however, have indicated that content-based restrictions will be measured under a compelling state interest standard. See e.g., *Pacific Gas and Electric Co. v. Public Utilities Commission of California* (*Pacific Gas*), 106 S.Ct. 903 (1986).

187. Subsequent to the Court of Appeals' decision in *Quincy*, the Supreme Court has again given guidance on how to analyze whether a particular regulation is content-based. In *City of Renton v. Playtime Theatres, Inc.* (*Renton*), 106 S. Ct. 925 (1986), the Court upheld as content-neutral a zoning regulation that imposed more stringent requirements upon adult theatres than upon other kinds of theatres. The regulation clearly had the effect of discriminating between classes of speakers; nevertheless, the Court determined that the *Renton* ordinance was "completely consistent" with the Court's definition of content-neutral speech regulations because the ordinance "was justified without reference to the content of the regulated speech." *Id.* at 929 (emphasis in original).¹⁴⁹ In other words, the Court focused not on the incidental First Amendment effects of the regulation, but on the fact that the ordinance's primary purpose was not content-based. *Renton* thus indicates that the fact a regulation distinguishes between classes of speakers is not dispositive of its content-neutral or content-based status; rather the Court's analysis centered on the purposes underlying the regulation. Where the regulation is not designed to promote or suppress particular viewpoints, it is deemed content-neutral.¹⁵⁰ As the Court noted, this approach is fully consistent with the First Amendment's underlying purpose; namely to ensure that "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those

¹⁴⁹ The Court concluded that the regulation was designed to prevent the second effects of adult theatres on the surrounding community; namely, to prevent crime, protect the city's retail trade, maintain property values, and generally preserve the quality of the city's neighborhoods. *Id.* at 4162.

¹⁵⁰ Like the court in *Quincy*, we recognize that the same *O'Brien* test would apply to newspapers in assessing the constitutionality of a content-neutral rule. See *Quincy*, *supra*, at 1452. Thus, in applying the *Renton* test for determining content-neutral status in this proceeding, we assume that cable operators have the same full First Amendment rights as newspapers.

wishing to express less favored or more controversial views.' " *Id.*

188. Like the former must carry rules (and the zoning regulation in *Renton*), the objective of the interim rules is unrelated to the enhancement or suppression of any particular opinion or viewpoints. The interim rules are designed solely to maintain the benefits of consumers' access to competitive video services during the transition period for the purpose of maximizing diversity of programming; they are not intended to prefer broadcast viewpoints over those of cable operators or programmers. Thus, the rules are not like the constitutionally infirm "right of reply statute" struck down in *Miami Herald*, *supra*, in which the reply obligation discriminated on the basis of viewpoints because it was triggered by a particular category of newspaper speech and was awarded only to those who disagreed with the newspaper's views. *See also Pacific Gas*, *supra*, 106 S. Ct at 910.¹⁵¹ Even though the interim rules might be seen as giving access to certain broadcasters, this access is not dependent upon the expression of particular viewpoints by the cable operator, nor is the carriage right based upon the viewpoints expressed in a particular broadcaster's programming. Thus, employing a *Renton* analysis, which would apply to newspapers as well as to cable, it appears that the interim must carry rules may properly be classified as content-neutral.

189. We believe that many of the First Amendment burdens singled out in *Quincy* as casting particular doubt on the must carry rules' content-neutral status go not to whether *O'Brien* is the appropriate test, but rather to whether the rules can be justified in light of the ancillary

¹⁵¹ In *Pacific Gas*, also decided after *Quincy*, a plurality of the Court struck down a utilities commission order that required a utility to include in its billing envelopes messages by a consumer organization. Four members of the Court agreed that the order burdened speech in the same manner as the right of reply statute in *Tornillo*.

burdens on speech that they impose. In any event, we have attempted to reduce or eliminate these burdens under the interim rules. Unlike the former rules, the interim must carry rules are configured to ensure that a cable system's capacity will not be saturated by mandatory signals, so that the effects on cable operators' editorial discretion and cable programmers' access to the public are no more severe than necessary and certainly less severe than under the former rules.¹⁵² We have examined this issue solely by reference to the principles set forth by the existing Supreme Court precedents, most recently in the *Renton* case. We are satisfied that, under the existing precedent, the interim must carry rules are content-neutral for purposes of determining whether *O'Brien* is the appropriate standard.¹⁵³

190. *Application of the O'Brien Standard.* As the Court of Appeals stated in *Quincy*, under an *O'Brien* analysis, a content-neutral regulation "will be sustained 'if it furthers an important or substantial government interest and . . . if the incidental restriction on alleged First Amend-

¹⁵² See para. 197, *infra*. In *Renton*, the Court observed that content-neutral time, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest "and do not unreasonably limit alternative avenues of communication." *Id.* at 4162. Although the *Renton* zoning ordinance significantly limited the locations in which adult theaters could be operated within the city, see dissenting opinion of Justice Brennan, the majority concluded that there was still a "reasonable opportunity" to own and operate an adult theater. *Id.* at 4163. Similarly, by limiting the number of stations that a cable system must carry, the interim regulations are designed to provide cable programmers a "reasonable opportunity" for carriage of their signals on cable systems.

¹⁵³ We recognize, of course, that to the extent the interim rules raise novel constitutional issues, a reviewing court may ultimately determine that some departure from past precedent is warranted. Any such extensions of the law, however, are more appropriately made by a reviewing court.

ment freedoms is no greater than is essential to the furtherance of that interest.' ”¹⁵⁴

191. As noted above, we have determined that the narrowly crafted mandatory carriage regulations that we are adopting today are necessary as interim measures to preserve the availability of the program choices to consumers, including broadcast signals, and to ensure that broadcasting has a fair opportunity to compete with cable until it can be assured that viewers have the knowledge and capability to receive off-the-air signals not carried on cable at Which time the interim mandatory carriage rules will no longer be required to assure competition. These objectives, in our view, constitute a sufficiently important interest to satisfy the first part of the *O'Brien* standard.

192. We recognize that the District of Columbia Circuit suggested in *Quincy* that the Commission failed to demonstrate that its former must carry rules furthered a substantial governmental interest. In this regard, the court stated that the mere invocation of a laudatory regulatory objective was not colorably sufficient to withstand constitutional scrutiny under the first part of the *O'Brien* standard¹⁵⁵ and emphasized that the government, under the *O'Brien* standard, bore a “heavy burden”¹⁵⁶ in demonstrating the importance of the regulatory interest. Applying this standard, the court found that the Commission had failed to satisfy, by empirical data, its affirmative obli-

¹⁵⁴ *Quincy*, 768 F.2d at 1451, quoting *O'Brien*, 391 U.S. at 377 (ellipses in original). In establishing this standard, the Supreme Court, in addition to the material quoted above, specified that the governmental regulation must be “within the constitutional power of the Government” (*O'Brien*, 391 U.S. at 377) and that the governmental interest [be] . . . unrelated to the suppression of free expression.” *Id.*

¹⁵⁵ *Id.* at 1454, 1457.

¹⁵⁶ *Id.* at 1454, 1457.

gation to obtain support for the assumptions underlying its analysis.¹⁵⁷

193. As reflected by subsequent Supreme Court case law, however, we believe that the court in *Quincy* required a more vigorous documentation of the substantiality of the governmental interest than is necessary under the first part of the *O'Brien* standard. In *Renton*, the Supreme Court concluded that a zoning ordinance involving adult theaters furthered the substantial governmental purpose of preserving the quality of urban life despite the absence of any specific studies demonstrating that regulatory intervention was needed to vindicate the city's asserted interest in enacting the ordinance.¹⁵⁸ As long as the governmental entity relies upon evidence that it reasonably believes is relevant, the Court determined that new studies supporting the governmental action were not necessary. The Court thus expressed its willingness to accept the interest identified by the governmental entity as substantial as long as that entity reasonably believes that the evidence supporting that interest bears some relation to the problem that the regulation is designed to correct.

194. Irrespective of whether or not the court in *Quincy* applied a proper burden of proof, however, we believe that the need for rules, including temporary provisions requiring the carriage of off-air television broadcast stations, in order to foster the governmental interest in maximizing

¹⁵⁷ *Id.* at 11457.

¹⁵⁸ The Supreme Court reversed the lower court, *inter alia*, for failing to provide sufficient deference to the articulated governmental interest. The Court noted that the Court of Appeals had found the "city's justifications for the ordinance" to be "conclusory and speculative" on the grounds that "the Renton ordinance was enacted without the benefit of studies specifically relating to 'the particular problems or needs of Renton.'" The Court concluded that this reasoning "imposed on the city an unnecessarily rigid burden of proof." *Renton*, 106 S.Ct. at 930, quoting *Renton v. Playtime Theatres, Inc.*, 748 F.2d 527, 537 (9th Cir. 1984).

diversity of program choices and in fostering competition among program sources constitutes a substantial and compelling government interest. In this regard, we have conducted a thorough and searching inquiry regarding whether or not the imposition of regulations governing signal carriage of cable systems is necessary to further our responsibilities under the Communications Act. We have carefully considered the comments of record and concluded, at this time, that the regulations adopted herein are in fact necessary to avoid potentially adverse effects on the range of program alternatives available to the public.¹⁵⁹ We believe that the evidentiary basis for this conclusion — which is set forth in the Need for Regulation section, above — amply satisfies the requirements specified under the first part of the *O'Brien* standard.¹⁶⁰

¹⁵⁹ As discussed above, *infra*, existing empirical data concerning the actual effects of deletion of the must carry rules on signal carriage is sparse. Moreover, given the rapidly evolving nature of the cable industry and changing competitive incentives resulting from the continuing development of satellite programming services carried by cable systems and other factors, *see* para. 39 *supra*, it is not clear that timely empirical studies could be carried out that would provide an accurate forecast of the effects of deleting the rules. The evidence does demonstrate, however, that a substantial number of cable subscribers have not maintained independent access to off-the-air reception and, therefore, would not currently be able to view stations if they were dropped by cable systems. Given the substantial federal interests at stake and the potential for cable systems to delete competitive broadcast services, we find that the record justifies continuance of must carry obligations as a transitional measure.

¹⁶⁰ As noted above, with the exception for noncommercial broadcast stations, the rule which we adopt today exempts cable systems with less than 20 activated channels from the mandatory carriage requirement. Because small cable systems have fewer channels upon which to disseminate information, we believe that even a limited mandatory carriage requirement for commercial stations would have a significant impact upon these systems' ability to choose programming for their subscribers. This exemption, therefore, reflects our view that although our interest in preserving the programming choices afforded by local

195. Under the second part of the *O'Brien* standard, a governmental agency is accorded a substantial degree of discretion in the manner in which it effectuates a regulatory purpose.¹⁶¹ In this regard, the Supreme Court has stated that:

[R]egulations [are not] invalid simply because there is some imaginable alternative that might be less burdensome on speech. Instead, an incidental burden on speech is not greater than is essential, and therefore is permissible under *O'Brien*, so long as the neutral regulation promotes

broadcasting is substantial, it must be balanced against the similarly substantial First Amendment rights of cable. We have concluded that the former must give way to the latter where cable has 20 or fewer channels. We note that the Supreme Court, in applying the *O'Brien* standard, recently stated that:

[T]he First Amendment does not bar application of a neutral regulation that incidentally burdens speech merely because a party contends that allowing an exception in the particular case will not threaten important government interests.

United States v. Albertini (Albertini), 105 S.Ct. 2897, 2907 (1985).

¹⁶¹ *Clark v. Community for Creative Non-Violence* (Clark), 468 U.S. 288 (1984); *Albertini, supra*. In *Clark*, the Supreme Court upheld the constitutionality of a regulation prohibiting camping in Lafayette Park against the contention that the regulation violated the First Amendment rights of demonstrators protesting the plight of the homeless. The Court rejected the argument that the regulation was over broad because the Park Service, short of an absolute prohibition on sleeping, could have adequately protected park lands by limiting the size, duration or frequency of the demonstration. In finding that the regulation comported with the least restrictive means criterion, the Court stated that the amount of protection which the parks require is a matter of dispute and that *O'Brien*:

[does not] assign to the judiciary the authority to replace the Park Service as the manager of the Nation's parks or endow the judiciary with the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained.

Clark, 468 U.S. 299 (footnote omitted). See generally *Renton*, 106 S.Ct. at 931.

a substantial government interest that would be achieved less effectively absent the regulation.¹⁶²

While the court, in *Quincy*, recognized that "its duty to police the First Amendment's requirement that intrusive governmental action be corrected does not imply the authority to 'finetune' administrative regulation,"¹⁶³ and that "[a]n agency typically has broad discretion over the manner in which it endeavors to effect its public interest objectives,"¹⁶⁴ it nonetheless found that the prior must carry rules were not sufficiently narrow in scope to justify their substantial infringement on the constitutional rights of cable operators. Indeed, characterizing the must carry rules as "fatally overbroad," The court stated that "it is difficult to imagine a less discriminating or more overinclusive means of furthering the Commission's stated objectives."¹⁶⁵

196. Unlike the former mandatory carriage rules invalidated in *Quincy*, we believe that the interim rules adopted in this proceeding are narrowly tailored to further our stated objectives. Indeed, with respect to overbreadth, our new mandatory carriage rules are different in several critical respects from the rules struck down in *Quincy*. For example, in *Quincy* the court stated that the Commission's former mandatory carriage rules: apply with equal force regardless of the degree of intrusion on First Amendment freedoms. They draw no distinction between cable systems that carry 100 signals and those that carry 12. Nor do they distinguish between systems that are saturated with must carry signals and those that are not.¹⁶⁶

¹⁶² *Albertini*, 105 S.Ct. at 2907 (citations omitted).

¹⁶³ *Quincy*, 768 F.2d at 1459, quoting *White House Vigil for the ERA Committee v. Clark*, 746 F.2d 1518, 1519 (D.C. Cir. 1984).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 1459.

¹⁶⁶ *Id.* at 1462, n.55.

By generally exempting cable systems with 20 or less activated channels and by providing for absolute limitations on the number of stations that a cable system must carry, however, which are scaled to the number of activated channels, our new rules guarantee that a significant amount of the programming capacity of cable operators will not be subject to mandatory carriage requirements. In this regard, the new regulations remedy infirmities in the prior must carry rules that the appellate court found to be "[e]specially troubling."¹⁶⁷

197. The court in *Quincy* also criticized the former mandatory carriage rules for "indiscriminately protect[ing] each and every broadcaster . . . irrespective of the number of local outlets already carried by the cable operator."¹⁶⁸ The rules we adopt today do not contain that deficiency. The rights of a "qualified" local broadcast station to carriage depend upon the number of other "qualified" stations in the community as well as the channel capacity of the cable operator. Accordingly, we believe that these rules fulfill our vital objective of maximizing program choices for viewers by providing limited, transitional protection to the over-the-air broadcasting system, yet do so in a manner which is least restrictive of the editorial discretion of cable operators.

198. Certain parties to this proceeding in effect contend that any rules that fail to provide protection for stations in financial need, such as struggling UHF stations, are not sufficiently tailored. These parties essentially argue that a failure to adopt rules that specifically aid stations they perceive to be "deserving" renders those rules constitutionally infirm. We disagree. Our objective in adopting these rules is neither to penalize nor to benefit any particular station. Rather, our objective is to temper, during

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 1460.

an interim period, potential threats to the program Source diversity provided by the system of "broadcasting." This goal is critically distinct from any asserted-interest, which we do not espouse, in protecting the service of particular "local broadcasters."¹⁶⁹ We have provided for an initial Twelve-month period in which new stations, regardless of viewership, will be eligible for must carry status. This should afford new facilities an opportunity to establish a marketplace position before becoming subject to the viewing standards in the new rules. We believe this approach is necessary to adequately protect the "entry" mechanism of the broadcasting system. Beyond this "new" station exception, however, we believe that the use of a viewership test as a qualification for mandatory carriage of commercial stations properly balances our interest in the continued availability of programming alternatives offered by the traditional, free broadcast television system and our interest in according the broadest possible editorial discretion to cable operators.¹⁷⁰

199. Finally, with respect to appropriate tailoring of our new regulations, it is critical to note that we have restricted them both in scope *and* in duration. While we believe that our interim mandatory carriage rules are sufficiently narrowly tailored to satisfy *O'Brien*, we recognize

¹⁶⁹ Id. at 1460 (emphasis in original).

¹⁷⁰ We note that the court, in *Quincy*, criticized the former must carry rules for providing "indiscriminate protection [for] every broadcaster regardless of whether or to what degree the affected cable system poses a threat to its economic well-being." Id. at 1461. As noted above, however, the new rules do not accord blanket protection for all local stations and the economic effect of the rules on any individual station is not our primary concern. On the contrary, a requirement that failing stations be carried might be inimical to the public interest, in that we might well be requiring cable systems to carry broadcast stations the public did not want to watch, thereby preventing the cable system from offering a program service the viewers preferred. This would run directly counter to the *Quincy* court's concern that our former must carry rules were unresponsive to consumer preference.

that any such rules nevertheless restrict cable's editorial discretion. Accordingly, we have designed these rules so that they will continue no longer than necessary and we have paired them with ongoing requirements relating to input selector switches and consumer education so that we can rely on the latter rather than the former as soon as possible. The mandatory carriage requirements imposed here will automatically terminate in five years and are specifically designed to facilitate a transition to an unregulated environment where free and open compensation in the marketplace of ideas will govern the success or failure of programming, whether it is delivered by cable or by broadcast television.

200. In conclusion, we believe that the rules which we adopt today satisfy the requirements of the First Amendment. These rules narrowly further the important governmental interest in maximizing program choices and preserving competition in video services, yet they are limited in both scope and duration to maximize the ability of cable to achieve full participation in the information services marketplace by preserving (under the compulsory licensing system) the ability of cable operators to freely exercise their editorial discretion and to thereby respond to their viewers needs.

Other Statutory and Constitutional Concerns

201. Several commenters opposed to must carry requirements argue that the Commission is prohibited from adopting new rules by Section 624 of the Cable Act¹⁷¹ and Section 326 of the Communications Act.¹⁷² Also, some opponents assert that must carry rules constitute a taking in violation of the Fifth Amendment.

¹⁷¹ 47 U.S.C. § 544.

¹⁷² 47 U.S.C. § 326.

202. *Comments.* Several cable parties argue that Section 624 of the Cable Act prohibits the Commission from reimposing mandatory carriage obligations on the part of cable operators. The 19 Cable Operators contend that Section 264 demonstrates a strong recognition by Congress of the First Amendment rights of cable operators consistent with the findings of the *Quincy* court. American Television and Communications Corporation (ATC) states that a central theme of the Cable Act generally, and Section 624 in particular, is to increase cable operators editorial discretion and to limit the ability of federal, state and local governments to influence cable programming content. In this regard, it claims that Section 624(b) prohibits the government from dictating the programming provided over a cable system.¹⁷³ ATC cites the House Report as underscoring the point that "[a] franchising authority is not permitted to establish particular service requirements which involve the provision of specific information to subscribers."¹⁷⁴

203. ATC, 89 Cable Operators filing joint comments (89 Cable Commenters) and others state that the provisions of Section 624(f)(1) and (2) of the Cable Act bar the Commission from adopting new rules.¹⁷⁵ They argue that since the must carry rules were declared unconstitutional, they

¹⁷³ Section 624(b) of the Cable Act provides, in part; "In the case of any franchise granted after the effective date of this title, the franchising authority, to the extent related to the establishment or operation of a cable system—(1) in its request for proposals for a franchise . . . may not establish requirements for video programming or other information services."

¹⁷⁴ H.R. Rep. 934, 98th Cong., 2d Sess. 69 (1984).

¹⁷⁵ Section 624(f)(1) provides that "[a]ny Federal agency, State, or franchising authority may not impose requirements regarding the provision or content of cable services, except as expressly provided in this title." Section 624(f)(2) provides that paragraph (1) shall not apply to any Commission rule either in effect on September 21, 1983, or amended after such date if the amendment is not inconsistent with the express provisions of the Cable Act.

no longer exist and, therefore, there are no rules that can be amended. They conclude that the Commission cannot either retain or amend the rules that the Commission thus is placed in "statutory stalemate."

204. The 89 Cable Commenters and the North Carolina CATV Association also argue that the anti-censorship provision in Section 326 of the Communications Act prohibits any must carry regulations.¹⁷⁶ They argue that such rules "interfere With the guaranteed rights of the cable operator and its subscribers to receive, free of governmental supervision or pressure, available, lawful communications of their choice."

205. ATC further contends that any must carry rule that confers an absolute right on a broadcast licensee to occupy some portion of a cable operator's channel capacity, thereby denying the operator use of that channel for other purposes, constitutes a governmental taking of property without just compensation. In this regard, ATC argues that must carry rules provide uninvited access to private cable property by local broadcast stations and require permanent use in violation of The Fifth Amendment.¹⁷⁷

206. *Evaluation.* We are unpersuaded that either the Cable Act, the Communications Act, or the Fifth Amendment prohibit the Commission from adopting new interim must carry rules. Turning first to the Cable Act, we believe that Congress was cognizant of the need to maximize program choices and to maintain an open, competitive market for television services in formulating legislation that would afford cable operators broad discretion over the con-

¹⁷⁶ Section 326 of the Communications Act withholds from the Commission "the power of censorship over the radio communications or signals transmitted by any radio stations" and prohibits it from promulgating any "regulation or condition which shall interfere with the right of free speech." 47 U.S.C. Section 326.

¹⁷⁷ *Loretto v. Teleprompter Manhattan CATV Corp. (Loretto)*, 458 U.S. 419, 441 (1982).

tent of their program services. Congress' recognition that an unbridled cable industry might destructively unbalance the nation's television system is evinced in The legislative history describing the need for the Cable Act. The legislative history states that "in adopting this legislation, the Committee is concerned that Federal law not provide the cable industry with an unfair competitive advantage in the delivery of video programming."¹⁷⁸ It is against this backdrop that Congress adopted Section 264 of the Cable Act.

207. With respect to ATC's assertion concerning Section 624(b) of the Cable Act, we observe that this provision only applies to franchising authorities. Inasmuch as the Commission is not a franchising authority, we conclude that Section 624(b) does not affect the Commission's authority to adopt interim must carry rules.

208. Section 624(f) melds together Congress' concerns for cable operators' editorial discretion and a competitive balance among providers of video programming. On the one hand, Congress limited the Commission's authority to affect the provision or content of cable services and, on the other hand, it lent its approval to such regulations by grandfathering those rules in place on September 21, 1983, and authorizing their subsequent amendment. In this regard, the only Commission regulations explicitly referred to in the House Report on the Cable Act are the former must carry rules. The House Report states that "[r]egulations which relate to the content of cable service and which remain in effect include the FCC's must-carry requirements."¹⁷⁹

209. We believe that this specific reference by Congress To the must carry rules and provision for their amendment by the Commission is an expression of Congress' intention that the Commission continue to have the authority to

¹⁷⁸ H.R. Rep. No. 934, 98th Cong., 2d Sess. 22 (1984).

¹⁷⁹ House Report, *supra* at 70.

regulate to maximize viewers' program choices and to promote a competitive environment for video services. Whereas Congress did not contemplate the court finding the must carry rules unconstitutional, we do not read the Cable Act as codifying the must carry rules or precluding their amendment.

210. We next address the jurisdictional issue raised in connection with the anti-censorship provision of Section 326 of the Communications Act. We believe that this provision also is not a statutory impediment to interim must carry rules. One of the primary thrusts of this proceeding is that regulations affecting cable television must be reconciled with free speech considerations. In this respect, in Section 326 of the Communications Act, Congress made clear its expectation that our regulations would be consistent with the First Amendment. As discussed herein, we believe that the rules we are adopting are consistent with the First Amendment under an *O'Brien* analysis and, therefore, we conclude that they do not transgress Section 326 of the Communications Act.

211. Finally, we find that the concerns raised in connection with the fifth Amendment do not present a constitutional bar to the rules we are adopting. We believe that must carry rules are not a "taking" against private property for public use without compensation. In this regard, the relevant constitutional test applicable in cases involving regulations under the Communications Act was articulated long ago and is still valid today:

If the injury complained of is only incidental to the legitimate exercise of governmental powers for the public good, then there is no taking of property for the public use, and a right of compensation, on account of such injury does not attach under the Constitution. When Congress imposes restrictions in a field falling within the scope of its legislative authority and a taking of

property without compensation is alleged, the test is whether restrictive measures are reasonably adapted to secure the purposes and objects of regulation. If this test is satisfied, then "the enforcement of uncompensated obedience" to such regulation "is not unconstitutional taking of property without compensation or without due process of law."¹⁸⁰ As established above, we believe that the transitional must carry rules are reasonably related to our federal objectives with respect to television service and further believe they do not prevent a reasonable use of the property.¹⁸¹ We conclude, therefore, that these rules do not result in an unconstitutional taking of property.¹⁸²

¹⁸⁰ *Trinity Methodist Church South v. Federal Radio Commission*, 62 F.2d 850, 853 (D.C. Cir. 1932) (citations omitted). See also *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 123-123, (1978), which also concludes that regulation of use of private property which impairs its value is not a taking if it serves a substantial public purpose and does not prevent a reasonable use of the property.

¹⁸¹ Here, it is clear that our interim rules permit reasonable use of cable facilities, see discussion *supra* at paras. 197-201; moreover, given the long history of federal and state regulation of cable since the service's inception, the interim rules plainly do not have a significant impact on investor expectations. See *Penn Central*, *Supra*, at 124-25. *Loretto*, *supra*, is not to the contrary. The case involved a permanent, physical occupation of property, a factor that is not present here. The *Loretto* Court also clearly distinguished those cases in which there was merely a restraint on the owner's use of property requiring an ad hoc analysis, as in *Penn Central*, *supra*, to determine if there is a compensable taking. See also *MacDonald, Sommer & Frates v. Yolo County*, 106 S. Ct. 2561, 2566 (1986), reiterating that the Court has no "set formula to determine where regulation ends and taking begins." (Citation omitted.)

¹⁸² The only federal appeals court to directly confront the Fifth Amendment issue presented by must carry rules stated that because the rules are reasonably related to the objectives of the Communications Act, they do not constitute a taking in violation of the Fifth Amend-

OTHER REGULATORY FACTORS AFFECTING TELEVISION MARKETS

212. In determining the need for regulation in this proceeding, we found that the former must carry rules contributed to the creation of a misperception on the part of cable subscribers which needs to be corrected before market mechanisms can be relied upon to achieve maximum diversity for the public. At this juncture, we also observe that there appears to be a number of factors and policies outside the scope of this proceeding that also create disequilibria in the competitive marketplace that may adversely affect viewers' access to program choices. First and foremost among these is the cable television industry's exemption from negotiating in the market for copyrighted broadcast program material, an exemption provided by the compulsory copyright licensing system enacted ten years ago. The effects of this exemption were magnified by the subsequent repeal of the syndicated exclusivity rules in 1979. Moreover, the Commission's prohibition against local telephone companies' ownership of cable television systems, and the exclusivity provisions in many local franchising agreements, have further insulated cable systems from some types of actual or potential competition.

213. The enactment of the compulsory copyright law, the repeal of the syndicated exclusivity rules, the federal prohibition on cable-telephone company cross-ownership, and the nonfederal restrictions on intramodal competition were undertaken in the interests of what were then perceived to be policies overriding whatever distortions in the market happened to have been created by these actions. Given the progressive maturation of the cable industry and the tensions created by the development of the video distribution market during the last several years, we believe

ment. See *Black Hills Video Corporation v. FCC*, *supra*. See also *Quincy* at 1447, n.27, wherein the court declined to address the petitioner's Fifth Amendment contentions.).

it appropriate to reassess whether, in light of current conditions, these measures continue on balance to truly maximize consumer choice in programming options or to otherwise serve our public interest objectives. Our action today is supportable in its own right based on the evidenced adduced in the record, independent of any examination of these matters or conclusions reached thereon. We believe it appropriate, however, to conduct a larger independent evaluation of the cable industry. Therefore, we have directed the staff to take the following actions:

*With respect to the question of exclusive franchises for cable systems, the Office of General Counsel will participate in the remand proceedings ordered in the Supreme Court's decision in *City of Los Angeles and Department of Water and Power v. Preferred Communications, Inc.*¹⁸³ and in any other case(s) raising the issue of whether exclusive cable television franchises comport with the First Amendment;

*The Mass Media Bureau and the Office of Plans and Policy will prepare inquiries to study the effects of the compulsory copyright licensing scheme, the absence of syndicated program exclusivity, and the effect of the network program exclusivity rules on maximizing consumer choice in the programming options available on cable television and broadcast television. The results of these inquiries will be used by the Commission as the bases for possible rule making and/or legislative proposals, as appropriate.

*The Common Carrier Bureau will prepare a Notice of Inquiry to obtain information on the question of the restriction on cable ownership placed on local exchange telephone companies, to develop possible legislative proposals, if appropriate.

214. In addition, we are recommending that Congress begin its own review of those aspects of the television

¹⁸³ 106 S. Ct. 2034 (1986).

market structure that pose impediments to a fully competitive environment for program services. IOn particular, we urge that Congress examine the efficacy of the compulsory copyright licensing system in light of the comments of the Department of Justice, the National Telecommunications and Information Administration, and others ion this proceeding. We intend to transmit to the Congress upon its completion the report of the Commission on the benefits and drawbacks of retaining the current compulsory licensing system for purposes of possible amendatory legislation, and we are prepared to work with the Congress in the interim on this matter should our participation be so requested.

PROCEDURAL MATTERS

215. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

I. Need for and purpose of the rules.

The Commission's mandatory signal carriage requirements were ruled constitutionally invalid in *Quincy Cable TV, Inc. v. FCC*. After examination of the record, the Commission determined that the most appropriate course of action in this matter is to adopt a regulatory program that will provide an orderly transition from the current situation where there is need for must carry regulation to its long term objective of developing an environment in which consumers will be able effectively to choose between cable and broadcast television program services. The first part of this two part program services. The first part of this two part program requires cable systems to offer their subscribers input selector switches that enables use of an antenna in conjunction with cable service and to implement a consumer education program To inform subscribers that it may be necessary to have off-the-air reception capability to receive all of the available broadcast signals. These requirements are intended to eliminate, over time, the cur-

rent perceived capability of cable systems to limit their subscribers' access to over-the-air broadcast stations. The second part of this program consists of interim must carry rules that will expire at the end of five years. These rules that will expire at the end of five years. These rules will provide for an orderly transition to a market environment where must carry regulations are no longer necessary. During the transition period, the input selector switch requirement and consumer education program will work to gradually supplant must carry rules and assure subscribers' access To local television broadcast stations.

II. Summary of issues raised by public comments in response to the initial regulatory flexibility analysis, Commission assessment, and changes made as a result.

A. Issues Raised. No commencing parties raised issues specifically in response to the initial regulatory flexibility analysis. However, several parties objected to imposing new must carry rules specifically on small cable systems, and other parties representing small broadcast stations supported the need for such rules. We believe that the interim must carry rules we are adopting impose a minimal burden on both large and small cable systems. We believe that our new requirements are particularly sensitive to the needs of small cable systems in serving their subscribers by not requiring systems with fewer than 20 channels to carry any stations other than one noncommercial educational station. The new rules will also not impose a significant burden on cable systems because they condition carriage on a system's usable channel capacity, thus ensuring that small cable systems are not overly burdened by must carry requirements. At the same time, these interim requirements will ensure that cable subscribers are not suddenly deprived of signals, particularly those of non-commercial educational stations. Likewise, we believe that the new rules consider the needs of small commercial and noncommercial stations by not requiring noncommercial

stations or stations that have been operational less than 12 months to meet the viewing standard criteria to qualify for carriage.

The input selector switch requirements and consumer education program will impose some cost burdens on all cable systems. The cost of supplying and installing the switch for new subscribers and of making the switch available to existing subscribers who choose to have it will be absorbed by cable systems. However, the switch is a low-cost item on a wholesale basis, and we anticipate that manufacturers will supply the switch to cable operators at volume discounts. In addition, installation costs will be minimal, since the switch will be installed at the same time that cable service is installed for new subscribers. Furthermore, the on-going nature of our requirements will spread the cost to the operator over an indefinite time period. We also believe that the cable operator will derive some benefits in the marketing of cable service by offering the switch to new subscribers. While we recognize that these requirements impose burdens on cable operators, we believe they are necessary and justified in light of the importance of our federal objectives.

We also recognize that the consumer education program will impose some burden on cable systems. However, we expect that cable operators will be able to consolidate these requirements with other system functions such as regular mailings. In fact, the consumer education program may benefit cable systems by providing a new opportunity for communication with subscribers. In addition, switch manufacturers may help reduce cable operators' burden by supplying them with switch installation instructions appropriate for use by consumers.

B. Assessment. As stated in our initial regulatory flexibility analysis, we anticipate that the interim mandatory carriage requirements will have significantly less impact than our previous must carry requirements. While the in-

put selector switch requirements will impose new burdens on cable operators, we believe they are necessary to the achievement of our federal objectives.

C. Changes made as a result of comments. While no parties filed comments concerning the initial regulatory flexibility analysis, many parties suggested alternative regulatory policies in the general comments. Our final decision in this matter reflects our consideration of these proposals and the effect of our policies on small business entities in both the broadcast and cable industries.

III. Significant alternatives considered and rejected.

We have considered all the alternatives presented in the *Notice* and those presented in the record in this proceeding. After full consideration of all of the issues raised throughout the course of this proceeding, we have adopted rules that we believe are the most reasonably fashioned in light of the facts and issues presented.

216. The rules adopted herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose new or modified requirements or burdens on the public. Implementation of these new/modified requirements and burdens will be subject to approval by the Office of Management and Budget as prescribed by the Act.

217. The Secretary shall cause a copy of this *Report and Order*, including the Final Regulatory Flexibility Analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with Paragraph 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. §§601 *et seq.*, (1981)).

218. Accordingly, IT IS ORDERED THAT under the authority contained in Section 4(i) and 303 of the Communications Act of 1934, as amended, Part 76 of the Commission's Rules and Regulations IS AMENDED as set forth in the attached Appendix B, subject to approval by the

Office of Management and Budget pursuant to the Paperwork Reduction Act of 1980. These rules and regulations ARE EFFECTIVE January 15, 1987.

219. IT IS FURTHER ORDERED, THAT good cause not having been shown, the "Emergency Motion to Terminate Proceeding or, Alternatively, to Defer Action," filed August 4, 1986 by Cole, Raywid & Braverman IS DENIED.

221. IT IS FURTHER ORDERED, THAT this proceeding and those in Docket Nos. 21323, 81-741, and 84-168 ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico

Secretary

APPENDIX A

List of Commenters Initial Comments

1. WLIG-TV, Inc.
2. Providence Journal Company
3. Ponderosa Television Inc.
4. USA Network
5. Meridian Communications Corporation
6. Centel Cable Television
7. Joint Comments of 89 Cable System Operators
8. Community Antenna Television Association, Inc.
9. Family TV Associates
10. Community TV Corp., Hudson Cablevision Corp.,
Lakes Cablevision Corp.,
Milford Cablevision Corp., and Souhegan Cablevision
Corp.
11. Press Broadcasting Company
12. Grace Cathedral, Incorporated
13. Maryland-District of Columbia-Delaware Broad-
casters Association, Inc.
14. Connecticut Cable Television Association, Inc.
15. National Cable Satellite Corporation—C-SPAN
16. Spanish International Communications Corporation,
Bahia de San
- Francisco Television Company, The Seven Hills Televi-
sion Company
17. New Jersey Public Broadcasting Authority

18. Donrey Media Group
19. Eternal Word Television Network, Catholic Cable Network
20. United Television, Inc.
21. National Telecommunications and Information Administration
22. New York State Commission on Cable Television
23. Channel 66 Associates Limited Partnership
24. National Association of State Cable Agencies
25. Financial News Network Inc.
26. United States Department of Justice
27. North Carolina Association of Broadcasters
28. ABC Television Affiliates Association
29. Taft Broadcasting Company
30. National Telephone Cooperative Association
31. Tele-Communications, Inc.
32. Association of National Advertisers, Inc.
33. Office of Communication of the United Church of Christ, Henry Geller
and Donna Lampert
34. National Association of Broadcasters
35. Western Communications Inc. and Gill Industries
36. Pennsylvania Pay Television, Inc.
37. TVX Broadcast Group, Inc.
38. Cape Video Network, Limited Partnership
39. State Public Broadcasting Networks of Alabama, Alaska, Connecticut,

Georgia, Iowa, Kentucky, Louisiana, Maryland, Mississippi, New Hampshire,

New York, Oklahoma, Rhode Island, South Carolina, South Dakota, Virgin

Islands, West Virginia, and Wisconsin

40. Maranatha Broadcasting Company, Inc.

41. Fleischman and Walsh on behalf of Adelphia Communications Corporation, Arizona Cable Television Association, Bucks County Cablevision, Coaxial Communications, The Essex Companies, Falcon Cablevision, Hauser Communications, Inc., Helicon Corporation, Maine Cable Company, McCaw Communications Companies, Inc., Mid-America Cable Television Association, Pennsylvania Cable Television Association, Sunbelt Cable, Ltd., Tele-Media Corporation, Tidel Communications Inc., Vision Cable Communications, Inc., Whitcom Investment Company, Whitney & Company, Inc., and W.W. Communications, Inc. (Nineteen Cable Operators)

42. Richard S. Leghorn

43. National Cable Television Association, Inc.

44. Association of Independent Television Stations, Inc.

45. Buffalo Broadcasting Company, Inc.

46. American Television and Communications Corporation

47. Black Entertainment Television

48. CBS Inc.

49. Station Representatives Association, Inc.

50. Corporation for Public Broadcasting, the National Association of Public

Television Stations, and the Public Broadcasting Service

51. Heritage Communications, Inc.

52. Astroline Communications Company Limited Partnership, Four Star

Broadcasting, Inc., Amistad Communications of the Southwest, Kyles

Broadcasting Ltd., Mandeville Communications Company of New Orleans

and Tampa Bay Broadcasting, Ltd.

53. The City of New York Municipal Broadcasting System

54. The City of Boston

55. American Cable Publishers Institute, Inc.

56. Howard University, The National Association of Black-Owned Broadcasters, The National Bar Association and the National Conference of Black Lawyers Communications Task Force

57. City of New York

58. Alaska Broadcasters Association, Bonneville International Corporation KIRO, Inc., Maine Radio and Television Company, WLBZ TV, Inc., Quincy Broadcasting Company, KTTC Television, Inc., WVVA Television, Inc., and WSJV Television, Inc.

59. Grant Broadcasting System, Inc.

60. Smaller Market UHF Television Stations Group

61. KWTX Broadcasting Co., Inc., Texoma Broadcasters, Inc., Brazos Broadcasters, Inc.

62. California Cable Television Association

63. Television Operators Caucus, Inc.

64. National Broadcasting Company, Inc.

65. Turner Broadcasting System, Inc.
66. Cosmos Broadcasting Corporation and WPNI Television Company, Inc.
67. Telepictures Corporation
68. Tulsa 23
69. United States Catholic Conference
70. Tribune Broadcasting Company
71. Gateway Communications, Inc.
72. The Association of Maximum Service Telecasters
73. North Carolina CATV Association
74. Seattle Television Limited Partnership
75. Association of Program Distributors
76. Studioline Cable Stereo Network/Studioline Corporation of America
77. KMSS-TV, Shreveport, Louisiana
78. Malrite Communications Group, Inc.
79. Motion Picture Association of America, Inc.
80. NATPE International
81. ATV Broadcast Consulting Inc.
82. Gray L. Christensen
83. Lincoln Broadcasting Company
84. Broadcast-Cable Associates
85. KQTV Television
86. W-TWO Television Center

Reply Comments

1. National Coalition For Minority Broadcasting

2. Heritage Communications, Inc.
3. Gray L. Christensen
4. Bureaus of Competition, Economics and Consumer Protection of the Federal Trade Commission
5. Richard S. Leghorn
6. American Communications and Television, Inc.
7. ABC Television Affiliates Association
8. Corporation For Public Broadcasting, the National Association of Public Television Stations and the Public Broadcasting Service
9. Summit Radio Corporation
10. Astroline Communications Company Limited Partnership, Four Star Broadcasting, Inc., Amistad Communications of the Southwest, Kyles Broadcasting, Ltd., Mandeville Communications Company of New Orleans and Tampa Bay Broadcasting, Ltd.
11. Financial News Network Inc.
12. New Jersey Public Broadcasting Authority
13. California Broadcasting Association
14. William B. Smullin
15. Joint Reply Comments of 89 Cable System Operators
16. Donrey Media Group
17. Great Trails Broadcasting Corp.
18. Bloomington Comco, Inc. and Gerald J. Robinson
19. Spanish International Communications Corporation, Bahia De San Francisco Television Company and The Seven Hills Television Company
20. National Cable Television Association, Community Antenna Television Association, National Association of

Broadcasters, Television Operators Caucus and Association of Independent Television Stations, Inc.

21. American Television and Communications Corporation

22. Grace Cathedral, Incorporated

23. National Telephone Cooperative Association

24. Office of Communication of the United Church of Christ, Henry Geller and Donna Lampert

25. City of New York

26. National Black Media Coalition

27. Cablevision Systems Corporation

28. Western Communications Inc.

Comments on the Industry Agreement

1. Malrite Communications Group, Inc.

2. McGraw-Hill Broadcasting Co., Inc., The New York Times Co. and Desert Empire TV Corp.

3. Maryland Public Broadcasting Commission

4. Community Antenna Television Association

5. National Coalition for Minority Broadcasters

6. Maranatha Broadcasting Company, Inc.

7. City of New York

8. WBNS-TV, Inc. and Video Indiana Inc.

9. Sunshine Television Inc.

10. Carolina Christian Broadcasting, Inc.

11. WLIG-TV, Inc.

12. Fisher Broadcasting, Inc.

13. Montana Television Network
14. Providence Journal Company
15. WTZA-TV Associates
16. Meridian Communications Corporation
17. Corporation for Public Broadcasting, the National Association of Public Television Stations, and the Public Broadcasting Service
18. Jim Francis
19. Grace Cathedral, Incorporated
20. Howard University, The National Association of Black-Owned Broadcasters, The National Bar Association and The National Conference of Black Lawyers Communications Task Force
21. American Cable Publishers Institute, Inc.
22. Robert Schultz, President, VideoProbeIndex, Inc.
23. St. Charles CATV Inc. and Chasco Cablevision, Ltd.
24. KUTV, Inc. and Kansas State Network, Inc.
25. Duhamel Broadcasting Enterprises
26. Turner Broadcasting System, Inc.
27. Richard S. Leghorn
28. The Frontier Broadcasting Companies
29. Fargo Broadcasting Corp.
30. United States Department of Justice
31. Cablevision Systems Corporation
32. Summit Radio Corporation
33. Channel 17 Associates, Ltd.
34. National Association of Broadcasters

35. WNJU-TV Broadcasting Corporation
36. Gill Industries, Inc.
37. ABC Television Affiliates Association
38. Alison Greene, Loyola Law Review
39. United States Catholic Conference
40. National Cable Television Association, Inc.
41. Adelphia Communications Corporation, Arizona Cable Television Association, Bucks County Cablevision, Coaxial Communications, The Essex Companies, Falcon Cablevision, Hauser Communications, Inc., Helicon Corporation, Maine Cable Company, McCaw Communications Companies, Inc., Mid-America Cable Television Association, Pennsylvania Cable Television Association, Sunbelt Cable, Ltd., Tele-Media Corporation, Tidel Communications, Inc., Vision Cable Communications, Inc., Whitcom Investment Company, Whitney & Company, Inc., and W.W. Communications, Inc. (Nineteen Cable Operators)
42. Metropolitan Board of Education, Long Island Educational Television Council, Metropolitan Pittsburgh Public Broadcasting Inc., and Santa Clara Board of Education
43. National Independent Television Committee
44. Television Operators Caucus, Inc.
45. Canadian Broadcasting Corporation
46. Association of Independent Television Stations, Inc.
47. Allen Broadcasting Corporation
48. Capital Cities/ABC, Inc.
49. WFLI, Inc.
50. Bloomington Comco Inc. and Gerald J. Robinson
51. City of Boston

52. Tribune Broadcasting Company
53. CBS Inc.
54. NATPE International
55. Ohio Educational Broadcasting Network Commission
56. Motion Pictures Association of America, Inc.
57. Organization for the Protection and Advancement
of Small Telephone Companies
58. Heritage Communications, Inc.
59. Grant Broadcasting System, Inc.
60. Spanish International Communications Corporation,
Bahia de San Francisco Television Company, and The
Seven Hills Television Company
61. National Telecommunications and Information
Administration
62. California Cable Television Association
63. KTUH, Inc.
64. Ninety-Seven Television Stations

Appendix B

Part 76 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 76 continues to read as follows:

AUTHORITY: 47 U.S.C. 154, 303, and 601.

2. Section 76.5 is amended by revising paragraphs (d) and (j) and adding new paragraphs (jj), (kk), (ll), and (mm) to read as follows:

§76.5 Definitions.

* * * * *

(d) *Qualified television station.* (1) Any television broadcast station, as defined in §76.5(b), that with respect to a particular cable system:

(i) Is licensed to a community whose reference point, as defined in §76.53, is within 50 miles of the principal head-end of the cable system; and

(ii) If a commercial station, receives an average share of total viewing hours of at least 2 percent and a net weekly circulation of at least 5 percent, as defined in §76.5(k), in noncable households in the county served by the cable system or has been operational less than one full year. For purposes of this section, a station is considered operational as of the date it commences operation under program test authority. The viewing standards of this paragraph shall not apply for one full year from January 15, 1987 to otherwise qualified stations that commenced operation after July 19, 1985, but before January 15, 1987 (the effective date of these rules).

(2) Any noncommercial educational television station's translator with 100 watts or higher power serving the cable community.

* * * * *

(j) *Substantially duplicates.* Regularly duplicates the network programming of one or more stations in a week during the hours of 6 to 11 m., local time, for a total of 14 or more hours.

(jj) *Usable activated channels.* Channels engineered at the headend of the cable system for the provision of services generally available to residential subscribers of the cable system, regardless of whether such services actually are provided, including any channel designated for public, educational, or governmental use but excluding channels whose use for the distribution of broadcast signals would conflict with technical and safety regulations. See Part 76, Subpart K.

(kk) *Principal headend.* The location of the cable system equipment used to process the signals of television broadcast stations for redistribution to subscribers. Where more than one location meets the above definition, the cable operator shall designate a single location as the principal headend.

(ll) *Television survey season.* The twelve-month period beginning April 1 of one year and ending March 31 of the following year.

(mm) *Input selector switch.* Any device that enables a viewer to select between cable service and off-the-air television signals. Such a device may be more sophisticated than a mere two-sided switch, may utilize other cable interface equipment, and may be built into consumer television receivers.

3. Section 76.7, Special Relief, is amended by removing paragraph (g) and redesignating paragraph (h) as paragraph (g).

4. Section 76.53 is amended by revising the first sentence to read as follows:

§76.53 Reference points.

The following list of reference points shall be used to determine whether a television station is "qualified" pursuant to §76.5(d) and to identify the boundaries of the major and smaller television markets (defined in §76.5).

* * * * *

5. Section 76.55 is amended to read as follows:

§76.55 Qualified television station; method to be followed for showings.

A commercial television station shall demonstrate that it meets the viewing standard specified in §76.5(d)(1)(ii) on the basis of an independent professional survey of noncable homes conducted according to the following provisions:

(a) If the station has been operational, as defined in §76.5(d)(1)(ii), for at least one complete television survey season, the survey shall cover four separate, consecutive four-week periods, including one in each of the four quarters of the survey season (i.e., April-June, July-September, October-December, January-March), and be conducted pursuant to the methodology used to compile Appendix B of the *Memorandum Opinion and Order on Reconsideration of Cable Television Report and Order*, FCC 72-530, 36 FCC 2d 326 (1972).

(b) If the station has been operational, as defined in §76.5(d)(1)(ii), for less than one complete television survey season, the survey shall cover a single period of at least two weeks. The survey sample shall be proportionally distributed among the noncable homes in the county served by the cable system and shall be of sufficient size to assure

that the reported results are at least one standard error above the required viewing standard.

6. A new section 76.56 is added to read as follows:

§76.56 Mandatory carriage of television stations.

(a) A cable system shall carry the signals of qualified television stations in accordance with the following provisions:

channels	TV signals	Cable channels	TV signals	Cable channels	TV signals
21 - 29	7	62 - 65	16	98 - 101	25
30 - 33	8	66 - 69	17	102 - 105	26
34 - 37	9	70 - 73	18	106 - 109	27
38 - 41	10	74 - 77	19	110 - 113	28
42 - 45	11	78 - 81	20	114 - 117	29
46 - 49	12	82 - 85	21	118 - 121	30
50 - 53	13	86 - 89	22	122 - 125	31
54 - 57	14	90 - 93	23	above 125	25 % of
58 - 61	15	94 - 97	24		capacity

(1) A cable system shall carry the signals of qualified noncommercial educational television stations or translators of such stations, as follows:

(i) A cable system with fewer than 54 usable activated channels shall carry the signal of one qualified noncommercial educational station or translator;

(ii) A cable system with 54 or more usable activated channels shall carry the signals of two qualified noncommercial educational stations or translators.

(2) A cable system with 21 or more usable activated channels shall carry the signals of qualified television stations as follows:

(b) Where the number of qualified television station signals exceeds the number that a cable system is required to carry pursuant to paragraph (a) of this section, the cable system may select which of the signals to carry, *except that* carriage of qualified noncommercial educational station signals pursuant to paragraph (a)(1) of this section is nondiscretionary.

(c) In complying with the provisions of this section, a cable system shall be permitted but shall not be required to carry the signal of any qualified television station that:

(1) Substantially duplicates the signal of another qualified television station affiliated with a particular commercial national network;

(2) Would result in payment by the cable system of distant signal copyright fees;

(3) Fails to deliver to the cable system principal headend a picture of high quality providing enjoyable viewing and in which interference is no greater than just perceptible.

Note: In general, a signal level of -45 dBm for UHF signals and -49 dBm for VHF signals at the input terminals of the signal processing equipment would be needed to provide a picture of the required quality. Alternatively, a baseband video signal could be supplied.

(d) A cable system shall not accept payment or other consideration in exchange for carriage of the signal of any qualified television station carried in fulfillment of mandatory signal carriage obligations, *except that* any such station may bear any costs associated with: (1) delivering a good quality signal, as defined in §76.56(c)(3), to the cable system; (2) meeting copyright obligations that are incurred as a consequence of such carriage.

(e) A cable system shall identify on request those stations carried in fulfillment of its must carry signal carriage obligations.

7. Section 76.57, Provisions for systems operating in communities located outside of all major and smaller television markets, is removed.

8. A new section 76.58 is added to read as follows:

§76.58 Disputes concerning carriage.

(a) Any qualified television station not being carried may demand carriage from a cable system.

(b) As a prerequisite to a Commission decision concerning a television station's right to carriage, such demand shall be made in writing and shall include showings that:

(1) The station is a "qualified television station" as defined in §76.5(d);

(2) The cable system on which carriage is sought has not satisfied its carriage obligations under §76.56;

(3) To the extent that the matter is in dispute, the station delivers a good quality signal to the principal headend of the cable system pursuant to §76.56(c)(3).

(c) A cable system receiving a demand for carriage pursuant to this section shall respond in writing to the television station requesting carriage within fifteen (15) days of receipt of such demand. If the system declines to carry the station, the system's response shall state the reasons under the rules for such refusal.

(d) If no carriage agreement is reached between the parties, a ruling on the matter may be requested from the Commission. Such request shall contain a copy of the carriage demand, the response thereto, and any other information that may be considered relevant to a resolution of the question.

Pleadings responsive to such request may be filed within twenty (20) days. Initial requests and pleadings relating thereto shall be served on all parties to the proceeding. All factual allegations shall be supported by affidavit of a person or persons with actual knowledge of the facts, and exhibits shall be verified by the person who prepares them. An original and two (2) copies of the request and subsequent pleading(s) shall be filed.

(e) No cable system that, in refusing a carriage request, has complied in good faith with the mandatory signal carriage requirements of this chapter shall be subject to any forfeiture or penalty if it is later determined that the requesting station is entitled to carriage. If the Commission determines that the signal in question was or is entitled to carriage, the system shall commence such carriage within a reasonable period, to be specified by the Commission, and shall continue such carriage for at least twelve months.

(f) A cable system may be assessed a forfeiture or other penalty for failure to comply with a Commission order to carry a qualified broadcast station. Such Commission orders include action by the Chief of the Mass Media Bureau under delegated authority.

9. Section 76.59, Provisions for smaller television markets, is removed.

10. A new section 76.60 is added to read as follows:

§76.60 Carriage of other television signals.

(a) In addition to the qualified television station(s) carried pursuant to §76.56, a cable system may carry the signals of any other television station, low power television station, or television translator.

(b) A cable system shall be permitted, but shall not be required, to carry any subscription television broadcast

program or any ancillary service transmission on the vertical blanking interval or the aural baseband of any television broadcast signal including, but not limited to, multichannel television sound and teletext.

11. Section 76.61, Provisions, for the major television markets, is removed.

12. A new Section 76.62 is added to read as follows:

§76.62 Manner of carriage.

(a) Where a qualified television broadcast signal is carried by a cable system in fulfillment of the mandatory signal obligations set forth in this part of the rules:

(1) the signal shall be carried in full, without deletion or alteration of any portion, except as required by this part;

(2) the signal shall be carried in its entirety, without material degradation, on the lowest-priced, separately available cable service tier.

(b) Where a television broadcast signal otherwise is carried by a cable system pursuant to the rules in this part, programs broadcast shall be carried in full, without alteration or deletion of any portion, except as required by this part.

13. Section 76.64 is revised to read as follows:

§76.64 Expiration of mandatory carriage provisions.

The provisions of §§76.56, 76.58, and 76.60, and 76.62(b) shall remain in force until January 15, 1992, and shall thereafter be of no further force or effect.

14. Section 76.65, Determination of signal contours, is removed.

15. A new Section 76.66 is added to read as follows:

§76.66 Input selector switches.

(a) A cable system operator shall supply to each new subscriber and offer to supply to each existing subscriber an input selector switch for each separate television receiver to which cable service is provided by the cable operator. The operator shall comply with the following requirements in providing the switch and installing cable service:

(1) Supply and install the switch at no additional cost to new subscribers, unless the subscriber already has an input selector switching device or his/her television has such a device built-in;

(2) Offer to supply the switch to any person who is a subscriber on January 15, 1987, within six months of that date and thereafter on an annual basis until January 15, 1992, at no cost other than reasonable labor charges for installation, if necessary or requested, by providing the following form, in the same words or in other words that convey the same meaning, to all such persons who do not have input selector switches:

In accordance with FCC rules, we are offering to supply you with an input selector switch, at no cost, for each separate television receiver To which cable service is provided. This device, which connects both to the cable service and an antenna you supply, will enable you to select between cable service and off-the-air television signals. You may already have such switching capability, either in a separate device or as a built in feature to your television receiver. If you already have this capability you do not need an additional switch. However, if you do not have such switching capability, we will install a switch for a reasonable charge that reflects our actual labor costs or we will provide you a switch with written self-installation instructions at no charge. If you wish to obtain an input

selector switch, please check the appropriate box below and return this form to our business office.

[] I wish to have an input selector switch installed. I understand that I will be charged reasonable labor costs for this service.

[] I wish to receive an input selector switch with installation instructions at no additional charge.

Please contact [NAME OF CONTACT AT CABLE SYSTEM OFFICE] at [ADDRESS AND TELEPHONE NUMBER] for further information.

(3) Comply with the following requirements with respect to antennas:

(i) If an antenna is present, the operator shall not recommend that the antenna be removed;

(ii) If an antenna is not present, the operator shall inform the subscriber that the switch will be operational only if it is connected to an antenna, which The subscriber may purchase from an antenna supplier;

(iii) Where the operator installs a switch and an antenna is present, it shall connect the switch to that existing antenna.

(b) Input selector switches used for alternating between a cable system and an antenna for reception of television broadcast signals shall comply with the technical standards of §15.606(a) of the rules.

(c) The cable system operator shall provide the following information, in the same words or in other words that convey the same meaning, to each new subscriber at the time of installation of cable service and to existing subscribers that do not have input selector switches in writing within six months after January 15, 1987, and annually thereafter to all subscribers:

The FCC in 1986 adopted new requirements concerning cable system carriage of local television broadcast stations.

Under these regulations, a cable system will be required to carry one or more local broadcast stations, but not necessarily all such stations, until January 15, 1992. After that date, carriage of local broadcast stations will be at the discretion of the cable operator. As a result, at this time or at a later date, you may not be able to receive all local television stations over your cable system. To ensure that you will retain the capability of receiving all of the broadcast stations that are available off-the-air, Which might not be carried on the cable system, either now or in the future, it may be necessary to use an input selector switching device in conjunction with an antenna. This device, which connects both to your cable service and your antenna, will enable you to select between cable service and off-the-air television signals.

At this time, [NAME OF CABLE SYSTEM] is not carrying the following local broadcast stations: [LIST CALL LETTERS AND CHANNELS]

Questions related to input selector switches should be directed to [NAME OF CONTACT AT CABLE SYSTEM OFFICE] at [TELEPHONE NUMBER].

**SEPARATE STATEMENT
OF
COMMISSIONER JAMES B. QUELLO**

Re: Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Systems (MM Docket No. 85-349)

The must-carry rules adopted by the Commission on August 7, 1986, are the very minimum that I can support. I continue to believe that only comprehensive must-carry rules can guarantee full protection to our system of over-the-air television broadcasting and the government's legitimate interest, pursuant to Sections 1 and 307(b) of the Communications Act, in fostering a system accountable to the public interest. Cable, once installed, is a geographic bottleneck¹ with, unlike broadcasting, little or no program accountability to any public or government authority. As I have stated on many occasions, the Commission should have appealed the *Quincy* decision.² The court of appeals,

¹ The Commission's *Order* emphasizes that cable is misperceived as a "gatekeeper" because the Commission's policies made it unnecessary for subscribers to maintain alternative means for receiving off-the-air broadcast signals. I disagree with this simplistic evaluation of cable's power. In my opinion, even assuming that the A/B switch is a workable device, cable's ability to pick and choose which off-the-air stations to offer subscribers carries with it the power to affect a station's viewership and revenues, if not survivability. This power cannot be reduced so easily to a single-minded notion of consumer misperception.

² I fully agree with one of the observations of a well-known columnist:

. . . .

... In one of the least appearing judicial pronouncements since a federal judge destroyed the phone company, a three-judge panel of the U.S. Court of Appeals decided in July to strike down the So-called "must-carry" rules affecting cablecasters. The rules required cable systems to offer their subscribers all available TV stations in their service area.

This sometimes did lead to duplication of program choices (if, for in-

in my opinion, went far beyond the scope of review invested in the judiciary and, left unreviewed, created uncertainty and conflict both over the appropriate First Amendment standard to be applied to cable,³ as well as the appropriate standard to be used when reviewing an agency's exercise of its policy-making function.⁴

stance, there were two ABC affiliates or two public TV stations on the same cable system), but it also helped keep the system and the service locally accountable.

The Cable Complications, The Washington Post, Sept. 4, 1985 (Tom Shales).

³ Our *Order* discusses in detail the constitutional controversy surrounding cable operators' First Amendment rights. As the *Order* points out, the Supreme Court has not addressed the question of whether cable is entitled to First Amendment Protection akin to that enjoyed by newspapers. And in the courts of appeals there is a considerable diversity of viewpoints on this subject. I hope the day will soon be here when all participants in video communications will enjoy full First Amendment rights. That day, however, has not yet arrived. So long as cable voluntarily enters the video market and heavily uses off-the-air broadcast signals as part of its public offering, it thereby submits itself to a regulatory scheme established by Congress for broadcasting. In other words, I still believe that the only court to have addressed specifically the constitutionality of our must-carry rules (prior to *Quincy*) correctly concluded:

The Commission's effort to preserve local television by regulating CATVs has the same constitutional status under the First Amendment as regulation of the transmission of signals by the originating television stations. It is irrelevant to the Congressional power that the CATV systems do not themselves use the air waves in their distribution systems. The crucial consideration is that they do use radio signals and that they have a unique impact upon, and relationship with, the television broadcast service. Indiscriminate CATV development, feeding upon the broadcast service, is capable of destroying large parts of it. The public interest in preventing such a development is manifest.

Black Hills Video Corp. v FCC, 399 F.2d 65, 69 (8th Cir. 1968).

⁴ The *Quincy* court, in faulting the Commission for having failed to develop an adequate factual basis to support its economic harm argument, imposed on this agency a standard of proof for rulemaking

Although still short of the mark, I voted to adopt the Commission's refashioned must-carry rule. It does seem to represent a sincere attempt to adopt a workable and reasonable compromise position. It provides carriage for the most popular stations as well as public broadcasting stations. And it takes into consideration the plight of newcomers. I still, however, find it necessary to issue this separate statement to express disagreement with some aspects of the *Report and Order* as well as to elaborate on

that was, in my opinion, far in excess of that normally applied when a court reviews an agency performing its functions as a legislator. It is well recognized that in rulemaking "the factual component of The policy decision is not easily assessed in terms of an empirically verifiable condition," but rather involves issue in which "a month of experience will be worth a year of hearings." *Association of National Advertisers, Inc. v. FTC*, 627 F. 2d 1151, 1168 (1979) (quoting from *American Airlines, Inc. v. CAB*, 359 F.2d 624, 633 (D.C. Cir. 1966) (en banc)). See also *FCC v. National Citizens Committee*, 436 U.S. 1775, 813-14 (1978). Even if a stricter standard is to apply in cases where there are First Amendment implications requiring application of the *O'Brien* standard, the *Quincy* court appeared unwilling to give the Commission the benefit of any doubt. In another case, where the balancing of First Amendment rights were just as delicate and difficult as they were here, The Supreme court paid considerable attention to the agency's views:

The judgment of the Legislative Branch cannot be ignored or undervalued simply because one segment of the broadcast constituency casts its claims under the umbrella of the First Amendment. That is not to say we "defer" to the judgment of the Congress and the Commission on a constitutional question, or that we would hesitate to invoke the Constitution should we determine that the Commission has not fulfilled its task with appropriate sensitivity to the interests in free expression. The point is, rather, that when we face a complex problem with many hard questions and few easy answers we do well to pay careful attention to how the other branches of Government have addressed the same problem. Thus, before confronting the specific legal issues in these cases, we turn to an examination of the legislative and administrative development of our broadcast system over the last half century.

CBS, Inc. v. DNC, 412 U.S. 94, 103 (1973). It seems to me that the court of appeals simply ignored the highest court's teachings, 106 S. Ct. 930, 931 (1986).

a substantial government interest that is not relied upon in our *Order* as well as to elaborate on a substantial government interest that is not relied upon in our *Order* as well as to elaborate on a substantial government interest that is not relied upon in our *Order* but which, in my view, is the single most significant reason why the new rules are, and the old rules were, constitutionally sound. I would also like to take this opportunity to state to state that if the plan we have adopted is not implemented in all significant respects, or whatever reason, I will be left with little choice but to urge that we reinstate our former must-carry rule, or, at a minimum, adopt a must-carry rule, without a sunset date, as urged in the industry compromise.

The most obvious shortcoming of our *Order* is that in justifying a must-carry rule, it does not rely on the substantial government interest in protecting the integrity of our Table of Assignments and ensuring public access to stations that have a statutory obligation to serve their local communities. In my view, both interests are substantial enough to justify a must-carry rule, without resort to any notion that broadcasters face economic ruin in the absence of as must-carry rule.

The Commission's *First Report and Order*, 38 F.C.C. 683 (1965) sought to protect all of the above interests. As we explained then:

Persons unable to obtain CATV service, and those who cannot afford it or are unwilling to pay, are entirely dependent upon local or nearby stations for their television service.

The Commission's statutory obligation is to make television service available, so far as possible, to all people of the United States on a fair, efficient, and equitable basis (Sections 1 and 307(b) of the Communications Act). This obligation is not met by primary reliance on a service which, technically, cannot be made available to many peo-

ple and which, practically, will not be available to many others. *Id.* at 699.

* * * *

Because it is inconsistent with the concept of CATV as a supplementary service, because we consider it an unreasonable restriction upon the local station's ability to compete, and because it is patently destructive of the goals we seek in allocating television channels to different areas and communities, we believe that a CATV system's failure to carry the signal of a local station is inherently contrary to the public interest. Only if we were persuaded that the overall impact of CATV competition upon broadcasting would be entirely negligible could we consider countenancing such a practice. *Id.* at 705.

That these are substantial government interests seems intuitive. While not easily susceptible to empirical proof, they are the types of policy decisions that independent agencies were specifically created to consider. See note 2, *supra*. And the Supreme Court apparently agreed with our justification for a must-carry rule when, in *Capital Cities Cable, Inc. v Crisp*, 104 S. Ct. 2694, 2708 (1984), it noted that our "comprehensive regulations . . . to govern signal carriage . . . reflect an important and substantial federal interest."

The record before us again contains strong support for the notion that maintaining the integrity of our general spectrum allocation scheme and our longstanding statutory obligation to promote localism justify a must-carry rule.⁵

⁵ See e.g., Comments of the Association of Independent Television Stations, Inc.; Television Operators Caucus; Inc.; National Broadcasting Company; and National Association of Broadcasters. See also Reply Comments of National Cable Television Association which, in justifying the industry proposed compromise, stated that the compromise tries to

That the Commission chose not to emphasize this substantial government interest justification is disheartening to say the least. I in no way mean to suggest that our principal rationale is not sufficient to support our rule. It should be more than adequate. On the other hand, we have consistently emphasized a licensee's local nonentertainment programming obligation in our radio and television deregulation orders. *Radio Deregulation*, 98 F.C.C.2d 968, 977 (1981); *TV Deregulation*, 98 F.C.C.2d 1076, 1091-92 (1984), reconsideration denied, F.C.C.2d (1986), appeal appending, *Action for Children's Television v FCC*, No. 86-1425 (D.C. Cir., filed July 23, 1986). This is an obligation which, in the past, we apparently regarded as arising from 307(b) of the Act. *Pinellas Broadcasting Company v. FCC*, 230 F.2d 204, 207, *cert denied*, 76 S. Ct. 650 (1956). And while the Commission may have subtly attempted to recast the obligation as solely within our discretion, the court of appeals went out of its way to note that the public interest standard imposes statutory nonentertainment programming obligations on licensees. *UCC v FCC*, 707 F.2d 1413, 1429, n. 46 (1983). Having made localism the cornerstone of our deregulatory policy, it simply makes no sense not to cite this as the most persuasive justification for adopting a must-carry rule. Our *Order* deserved much more than simply passing reference to this singularly most significant government interest.

ensure "that there will continue to be available to the public a reasonable quantum of free television service." Reply comments at p. 3. But most trenchant is the comment of the Honorable John C. Danforth, Chairman, Committee on Commerce, Science and Transportation, in his letter to Chairman Mark S. Fowler on July 22, 1986, at page 4:

If the Commission acquiesces to circumstances that bestow gatekeeper status upon cable systems, this will conflict with three longstanding, substantial government interest—the public's First Amendment right of access to diverse sources of information, the preservation of vigorous competition among communications services, and the Commission's statutory obligation to promote as nationwide broadcasting service built upon local outlets.

I must also make some remark about our heavy reliance on the A/B switch. When I dissented from the Commission's refusal to appeal the *Quincy* decision, I expressed considerable skepticism that the A/B switch could realistically be relied upon to maintain access to off-the-air television in homes wired to a cable system. I re-emphasized that concern to my colleagues in July, pointing out that it was doubtful cable subscribers would maintain an antenna system solely to view the local stations a cable system chose not to carry. And commenters also voiced grave reservations about the utility of the A/B switch.⁶ Nevertheless, I decided that a proposal requiring that the public be educated on the need for an A/B switch, coupled with a requirement that cable systems provide subscribers with an A/B switch, was worth trying. At a minimum, it has the potential of providing future empirical data on the marketplace feasibility of the switch. At the same time, it has been impossible not to take note of the criticism of our decision already reported by the press. While these views will not be considered by the Commission in issuing the *Order* it adopted on August 7, I want to forecast my intent to reconsider my vote should parties present persuasive arguments, on reconsideration, that the A/B switch, or something functionally equivalent, will not work. If an A/B switch will not work, then, until we can find an alternative means for ensuring the public's access to their local television stations, a permanent, comprehensive must-carry rule would be appropriate.

I want to make absolutely clear that I will use my best efforts to block any sunset of our must-carry rule should we have credible evidence that our program or assumptions underlying the program are in error. In addition, the comments we receive in response to the inquiries we will

⁶ See e.g., Comments of the *National Association of Broadcasters*, June 1986; Letter to Commissioner James H. Quello from Preston Padden, June 19, 1986.

initiate concerning the compulsory license scheme, telco entry, and syndicated and network program exclusivity, will be highly relevant to my decision whether to permit sunset of our rules. In 1984, I dissented to the Commission's refusal to initiate an NOI to examine changes in the marketplace since elimination of the syndicated program exclusivity rule. I believed then, as I do now, that this Commission must consider the effect of its actions in conjunction with Congress and the Copyright Royalty Tribunal. Our's is a broad, not narrow, mandate to regulate broadcasting, and we cannot fulfill that responsibility in a vacuum. *In the Matter of Cable Television Syndicated Program Exclusivity and Carriage of Sports Telecasts*, 56 RR 2d 625, 633 91984).⁷

As a last issue of major significance, I express considerable regret that I could not convince the Commission to do more for public broadcasting. Public broadcasting, although specially acknowledged in the Commission's plan, is certainly losing much of the coverage one might expect for a service chartered by Congress which continues significant funding. The diversity of views contemplated by Congress and supported through the years by this Commission can only be diminished under this plan which relegates to one video transmission pipeline a gatekeeping power over all video services that are licensed to serve the public interest in the area. While some may view elimination of must-carry requirements as a triumph of the marketplace, I view it as an unbalanced skewing of the marketplace to favor one participant over another. And, public broadcasting—created specifically to stand outside of the marketplace and offer alternative educational and

⁷ I disagree with the *Quincy* court's apparent conclusion that there is no connection between the compulsory license scheme and the Commission's must-carry rules. *Quincy*, 1768 F.2d at 1454, in. 42. See also, Comments of the *National Telecommunications and Information Administration* at p. 18, n. 30; Comments of *Association of Independent Television Stations, Inc.*

cultural television fare—stands to lose carriage of many of its stations.

In sum, I regret that we have not adopted broader must-carry rules; the experimental course we have chosen seems still inadequate to redress the critical marketplace imbalances fostered by the *Quincy* decision. Nevertheless, our action today provides a much needed transition study period of partial must-carry with ample latitude for cable to exercise First Amendment judgments. I fervently hope that our system of *free* television broadcasting, which serves virtually all of the nation, is not seriously impaired by a misguided effort to preserve alleged First Amendment right of a monopoly program distribution *pay* service that serves less than half of our citizens.

STATEMENT OF COMMISSIONER MIMI WEYFORTH
DAWSON

Re: *Report and Order in MM Docket No. 85-349*

I fully subscribe to the *Report and Order's* finding that the advent of a burgeoning nonbroadcast video programming industry warrants a fundamental redefinition of the federal interest we seek to further through cable television regulation. In adopting the 1984 Cable Act Congress specifically recognized the tremendous contribution to program diversity that satellite-delivered nonbroadcast services have provided.¹ This same recognition is evinced in the *Report and Order*, and constitutes a definitive and welcome affirmation of the proposition that this Commission also has a mandate to make satellite-delivered programming available to the American people that is, in my view, of no less importance than the mandate for broadcast television embodied in Section 307(b) of the Act.

Creating a competitive balance between terrestrial broadcasting and satellite-delivered nonbroadcast programming for purposes of cable carriage is significant,^m but in my view it constitutes only a modest first step towards remedying the disequilibrium that results from current federal policies that may give cable television an unwarranted competitive edge in the program delivery market and to skew the program diversity that might otherwise develop in a totally free market.

There are several policies accountable for this remaining disequilibrium. There is, for example, the compulsory copyright license that cable enjoys for retransmission of distant broadcast signals.² The compulsory license precludes broadcasters and other program producers from negotiating and selling the rights to their own product, instead

¹ H. Rept. 98-934, 98th Cong. 2d Sess. 1984, at 21.

² Copyright Revision Act of 1976, 17 U.S.C. Sec. 1 *et seq.*

allowing cable systems to take broadcast product for what appears to be a fraction of its real value on the open market. By thus allowing cable to fill channels cheaply with existing broadcast programming the compulsory license may inhibit the increased production of new cablecast and broadcast programming, thereby resulting in an overall diminution in the amount of program diversity that might otherwise be achievable. As a majority of the Commission stated at the time of the *Quincy* decision, "the mass media marketplace will not be set entirely right until cabled's copyright immunity is replaced with a scheme of full copyright liability, allowing unimpeded negotiations between the parties."³ It follows that program diversity will not be truly maximized unless and until the current compulsory copyright license is reexamined.⁴

Exacerbating the negative effects of the compulsory license is the absence of distant signal carriage restrictions and syndicated program exclusivity rules, deleted by the Commission in 1980.⁵ In particular the syndicated program exclusivity rule was intended to function as a copyright surrogate.⁶ There has been considerable debate over the extent to which the legislative history of the Copyright Revision Act evinced an intent that these rules not be

³ *Statement of Chairman Fowler and Commissioners Dawson and Patrick re Appeal of Quincy Cable TV, Inc. v. FCC*, August 2, 1985.

⁴ See generally *Cable Retransmission of Broadcast Television Programs Following Elimination of the "Must - Carry" Rules*, a report issued by the Office of Policy Analysis and Development, National Telecommunications and Information Administration (NTIA), U.S. Department of Commerce, 1985.

⁵ *Report and Order in Docket Nos. 20988 and 21284*, 79 FCC 2d 663 (1980), *aff'd sub nom. Malrite TV of New York v. FCC*, 652, F. 2d 1140 (2d Cir. 1981).

⁶ See e.g., *Report in Docket No. 20988*, 71 FCC 2d 951, 962, 976-77 (1979); *Report and Order in Docket Nos. 20988 and 21284*, *supra* n. 5, at 748.

abolished by the Commission.⁷ It appears that the Congress, and thus the Copyright Revision Act, may have anticipated that the Commission might fine-tune these rules but not jettison them altogether.⁸ This possibility calls for us to carefully reexamine the effect of the rules' deletion on the operation of the Copyright Revision Act.⁹

The practice of granting monopoly franchises to cable system operators is another government policy that not only unbalances competition but also raises serious First Amendment concerns. As recognized—indeed, acquiesced in¹⁰—by the Commission, [c]able television service has tended to develop on a noncompetitive, monopolistic basis in the areas served. The normal protection afforded consumers by providing a choice between alternative suppliers has not, in most instances, been available to cable television subscribers.¹¹

Exacerbating the monopoly franchise problem is the proscription against local exchange carriers' "provid[ing] video programming directly to subscribers in [their] own

⁷ See, e.g., *Cable Copyright Liability: Alternatives to the Compulsory License*, by Mark M. Bykowsky et al., NTIA, U.S. Department of Commerce, 1982, 21-27.

⁸ *Id.* at 27.

⁹ Another way of approaching this issue would be to reexamine whether readoption of either or both the syndicated exclusivity rules and some form of distant signal carriage restriction might perhaps be warranted. I would certainly be open to this approach and took forward with particular interest to reviewing the relevant legal and factual analyses that may be presented in this context.

¹⁰ In adopting its comprehensive regulatory program for cable television in 1972, The Commission elected to retain the current system of locally granted monopoly franchises. *Cable Television Report and Order*, 36 FCC 2d 143, 207-08 (1972).

¹¹ *Amendment of Part 74 of the Commission's Rules*, 15 FCC 2d 417, 425 (1968).

service area[s]."¹² I would hope that the Commission will now move with dispatch in releasing he inquiries into these subjects as outlined at Paragraph 213 of the *Report and Order*.

The effect of these governmentally created or condoned policies may well be to artificially restrict competition between cable systems and broadcast stations—indeed? between cable systems and anyone else. In this sense, government policy has helped to create the potential for cable to “bottleneck” reception of off-air and satellite programming. Depending on several factors, including the number of available off-air signals and the consumer’s ability to receive video programming adequately without cable television service, the cable bottleneck can cross the line from potential to real.¹³

I support the adoption of the interim must-carry rules because they afford the cable operator greater programming discretion without causing enormous dislocations in the current environment. However, in light of what I view as the *Quincy* court’s clear instruction,¹⁴ my preferred

¹² This proscription is contained in Section 613(b)(1) of the 1984 Cable Act, and reflects the same cross-ownership restriction appearing in the Commission’s Rules. Local television station licensees are likewise precluded under the Cable Act from owning cable systems within their stations’ Grade B contours, 47 U.S.C. Section 613(a).

¹³ Indeed, the possibility that unrestricted multiple ownership system ownership may measurably enhance cable’s bottleneck aspect has prompted the Commission to specifically examine the issue in Gen. Docket No. 86-836.

¹⁴ The *Quincy* opinion seems quite explicit on this point. “The Commission must make some effort to move beyond the amorphous in defining the interest served by the must-carry rules.” *Id.* at 1461. Moreover, on the need for any must-carry rule to be tailored so as to assure the achievement of our articulated goal, the court was equally specific: “[I]n the administrative context O’Brien’s substantial interest test ‘translates . . . into a record that convincingly shows a problem to exist’ . . . in the context of this case the question becomes whether the

course of action would have been to institute proceedings patterned after those conducted in the *Economic Inquiry*¹⁵ right now.

I believe the information we need to conduct the necessary factual analyses and econometric studies is largely either available or readily obtainable. Having factual knowledge in a timely fashion would at least have the benefit of producing in concrete form a showing of whether any must-carry rules at all are warranted and, if so, where and to what extent. Admittedly, this approach is not perfect, but it would appear preferable to delaying rulemaking proceedings of any kind for several years.

I would perhaps be more inclined to defer ultimate rulemaking if I had more confidence that the input selector (A/B) switch and consumer education program we adopt today would ultimately solve the must-carry problem satisfactorily. Unlike my colleagues, however, I am not convinced that the regulations the Commission has adopted today will achieve what they are intended to achieve; in fact, I believe they will have quite the opposite effect. For in the guise of deregulating cable television, I fear the Commission will only have succeeded in re-regulating the cable industry.

It is difficult to recall when in recent history this Commission has imposed a set of conduct-regulating rules so overbearingly specific in nature. Thus, for example, the rules state that The system operator "shall" supply to each new subscriber an A/B switch. Existing subscribers are

Commission has adequately proven that without the protection afforded by the must-carry rules the economic health of local broadcast television is threatened by cable." *Id.* at 1454-55, citation omitted.

¹⁵ *E.g.*, *Inquiry into the Economic Relationships Between Television Broadcasting and Cable Television*, 65 FCC 2d 9 (1977); *Economic Inquiry Report*, 71 FCC 2d 632 (1979); *Report in Docket No. 20988*, *supra*; *Notice of Proposed Rulemaking*, 71 FCC 2d 1004 (1979), *Report and Order in Docket Nos. 20988 and 21284*, *supra*.

treated only a little less heavy-handedly, depending on your perspective. Although they are allowed to decline the initial switch offer, the rules specify that they must be re-offered switches, in writing, once a year, every year, until either they give in or the interim rules expire, whichever occurs first. The rules also provide a text for the annual switch offer, complete with boxes to check indicating whether the subscriber wishes the switch installed or wants to install it himself. Finally, once a year, every subscriber has to be advised in writing that in 1986 the Commission changed the must carry rules; that not all local signals, or ultimately *any* local signals, may have to be carried; that the subscriber needs a switch; that the subscriber may need an antenna; what the switch is and how it works; and any local signals that are not currently carried.

The rules we adopt go into excruciating detail on consumer's rights. To label these insistent consumer advisories "cable *Mirfanda* warnings" does not do them justice: a closer analogy would be the traditional *Miranda* warning coupled with an informative lecture on the American criminal justice system. And although I would support regulations aimed simply at *encouraging* subscribers to use switches, this anachronistic throwback to the days of regulatory micromanagement casts much too large a federal shadow for me to accept.¹⁶

Remarkably, despite the detail of the regulations which we adopt, the rules may also create a *good* deal of uncertainty regarding cable *systems'* responsibilities. For example, although the rules prescribe in detail how and when switches shall be offered, they fail to provide any exemp-

¹⁶ Even at their regulatory zenith, the 1972 cable television rules never required cable system operators to explain to subscribers annually or any other way why, for example, the syndicated program exclusivity rules required the deletion of certain programs on certain stations, or why the sports exclusivity rules sometimes require that games on distant stations be blacked out.

tion for those systems serving areas where, due to terrain or other factors, no off-air service is available in the first place. Similarly, although the rules prescribe that switches have to meet the technical standards of Section 15.606(a) of the Rules to prevent harmful signal leakage, they provide no clue as to how the system operator is expected to definitively assure that subscriber-installed switches do not leak due to defective installation or subsequent adjustment. Nor do they indicate whether the operator is responsible for post-installation repair and similar service calls and if so under what circumstances. Finally, and most critically, although the rules recognize the critical importance of antennas in making receivable the off-air signals that the switch makes available, the *Report and Order* glides glibly, and in my view inaccurately, over the conceded nonprevalence of outdoor antennas and its likely impact on the success of the switch program.

In sum, I fear that these rules may give cable systems and consumers elements that are the worst of both worlds. On the one hand, the conduct of the system operator is micromanaged and the discretion of the cable subscriber is substantially restricted; on the other hand, the Commission has left substantial room for interpretation and reinterpretation. I sincerely hope that interested parties will not argue on reconsideration that, having required switches, we must now also move on to a federal program to provide outdoor antennas. That, to me, captures the problem with new Section 76.66: it almost inevitably results not in a satisfactory solution to the problem at hand, but rather in spawning a series of seemingly endless reinterpretations, clarifications, waivers, and the like. I short, micromanagement usually begets yet more micromanagement.

I am terribly concerned that the only thing the Commission will have done by its action today is to create tremendous confusion, uncertainty and costs for cable operators, cable subscribers, and broadcasters, and that this

unintended creation will drag us inexorably even further down a micromanagement path we have in virtually all other contexts heretofore declined to travel. Nor is this result simply a matter of philosophical handwringing. Far from it. For the total costs of implementing the input selector switch and consumer education program, including the costs to consumers of purchasing antennas, is estimated to cost from \$483 million to over \$1.6 billion. This would be an absolutely staggering burden to impose for any reason. In the context of this case, however, it would be imposed notwithstanding the program's substantial shortcomings and, perhaps worst of all, without even having first conducted proceedings designed to show whether or under what circumstances *any* prophylactic rules assuring cable subscribers' access to local broadcast programming are even warranted. The cable industry and, ultimately, cable consumers should not be asked to pay for what may in large measure be a nonsolution to a nonproblem.¹⁷ I am simply not yet convinced that the "mis-perception" problem is the consumer's rather than the Commission's, or that we have a workable way of solving it.

¹⁷ In this regard I would also note that the costs of implementing this program would be passed along to subscribers shortly after basic subscriber rates are deregulated on January 1, 1987.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

FCC 87-105
37021

In the Matter of)	
)	
Amendment of Part 76 of the	)	MM Docket
Commision's Rules Concerning	)	No. 85-349
Carriage of Television Broadcast)	
Signals by Cable Television Systems))	

MEMORANDUM OPINION AND ORDER

Adopted: March 26, 1987

Released: May 1, 1987

By the Commission: Commissioner Quello concurring in part
and dissenting in part and issuing a
statement.

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INTRODUCTION

1. Before the Commission are thirty Petitions for Reconsideration of its *Report and Order* in the above-captioned proceeding (*Report and Order*), adopted August 7, 1986, 1 FCC Rcd 864 (1986).¹ These petitions seek reconsideration of our policy decisions in the following broad categories: 1) the basic decision to implement a two-part regulatory program consisting of input selector switch and interim mandatory signal carriage requirements; 2) the technical standards for input selector switches; 3) the consumer education requirements; and, 4) The specific provisions of the interim must carry rules.

2. Upon consideration of these petitions, we continue to believe that the basic approach of input selector switch and interim must carry requirements is the most appropriate means for resolving the must carry matter. However, we recognize petitioners' arguments that the rules adopted in the *Report and Order* would impose substantial costs on cable operators and would in some cases require switches to be provided in areas with no available off-the-air signals. On further contemplation of this matter, we also are concerned that the input selector switch rules, as adopted, might reduce the flexibility of both cable operators and consumers with respect to the choice of switches that would be most suitable for individual needs or preferences. Accordingly, we are modifying the input selector switch and the associated consumer education requirements to reduce their burden on cable operators and to provide both cable operators and their subscribers with more discretion in the choice of switch options. We also

¹ Eight parties submitted responses either supporting or opposing the petitions for reconsideration, and nine parties filed replies to the responses. Appendix A provides a complete list of the parties filing petitions, responses/oppositions and replies concerning any aspect of the *Report and Order* or the issues raised in the requests for reconsideration.

are modifying certain provisions of the interim must carry rules to improve their effectiveness in achieving our objective in the least intrusive manner.

3. *Overview of the Must Carry Decision.* In the *Report and Order*, we determined that the federal interest in the must carry matter is to maximize the video program choices available to consumers. We observed that the federal interest in ensuring access to the maximum program choices includes ensuring access to the service of noncommercial educational television stations. We also recognized that any regulations we may consider in furtherance of our goal to maximize the availability of program choices by competing providers of video services, both off-the-air and on cable, must be weighed in terms of their impact on cable operators' and programmers' First Amendment rights.

4. With respect to the need for regulation, we stated that "because cable subscribers have not perceived the need to maintain or install antennas and input selector switches, their access to off-the-air broadcast signals is limited to those carried by the cable system to which they subscribe."² This perception derives not from any inherent characteristic of cable service, but rather from cable subscribers' current expectation that broadcast signals will always be available as part of their cable service. We further found that this expectation is a direct result of the former must carry rules, which required cable systems to carry all available off-the-air television signal. We observed that this expectation has caused many subscribers to believe that there is no need to install or maintain the capability to receive broadcast signals off-the-air. When consumers subscribe to cable service, they tend to disconnect, and in most cases dismantle, their antennas. We concluded that because of this misperception, many cable

² *Report and Order*, *supra* at 881.

subscribers do not have independent off-the-air reception capability and, thus, are not able to view available off-the-air broadcast signals not carried by their cable systems. In this regard, we found that there is ample evidence that cable penetration nationwide has reached a level where there is potential for this problem to affect a substantial portion of the population.

5. We determined that the misperception resulting in consumers' current practices respecting connection of their television sets to cable service is inimical to the public interest. In this regard, it tends to frustrate our federal objectives of maximizing program choices and promoting a fair and open competitive market environment that will produce programming that meets viewers' interests and preferences. Thus, we concluded that regulation is necessary to correct the undesired effects of our former must carry rules. We further concluded that this regulation must be designed to give viewers the capability to preserve and reestablish their independent access to the available off-the-air program choices in a manner that is least intrusive on the First Amendment rights of cable operators and programmers.

6. In view of the above, we determined that the most appropriate course of action to achieve our federal objective, while keeping First Amendment intrusions to a minimum, is to adopt a plan that will make cable subscribers aware of the need for the capability to access broadcast signals directly off-the-air and will actively assist the development of such capability. We stated that such an approach is consistent with our general belief that market mechanisms are the preferred method for ensuring that the interests of consumers are satisfied. To implement this course of action, we adopted a two-part regulatory program which is designed first to alter existing practices and knowledge with respect to connection of cable service that can render cable subscribers unable to receive broadcast television service and, second, to provide interim must

carry relief t the broadcast television industry during the transition to the new environment in which the connection of cable service would no longer have that effect.

7. Under the first part of our new regulatory program, cable systems are required to provide their subscribers with input selector switches that will enable reception of broadcast signals by means of an antenna. In addition, cable systems are required to implement a consumer education program to inform their subscribers of the purpose of, and need for, maintaining off-the-air reception capability. The second part of our program consists of interim must carry rules that will expire five years from their effective date.³

RECONSIDERATION OF THE BASIC POLICY DECISION

Summary of Petitions

8. Several parties request that we reconsider our basic policy decision to resolve the must carry matter through the two-part regulatory program adopted in the *Report and Order*. These parties submit varying arguments claiming that this program does not adequately ensure the preservation of the public interest with respect to the availability of broadcast television signals to cable subscribers or that it violates constitutional and/or statutory provisions, and they offer alternative plans intended to rectify its alleged deficiencies. Below is a summary of each of these requests for reconsideration of the general approach of our basic policy decision.

9. The National Cable Television Association (NCTA), the Community Antenna Television Association (CATA),

³ On December 24, 1986, we issued an *Order* staying the effective date of the new rules. In the *Order*, we also indicated that this stay would remain in effect until 30 days after the release of the instant *Memorandum Opinion and Order* addressing petitions for reconsideration filed in this proceeding. See *Order*, released December 24, 1986, FCC 86-575.

and the National Association of Broadcasters (NAB) [Joint Petitioners] filed a joint petition contending that the input selector switch rules are unworkable and contrary to the public interest. Their request for reconsideration is supported by Tele-Communications, Inc., TKR Cable Company, and TCI-Taft Cablevision Associates in a separately filed joint petition. Joint Petitioners argue that the input selector switch requirements will not provide an effective means of ensuring that cable subscribers have access to off-the-air television signals. They submit that any benefits of the input selector switch approach will be more than offset by increased costs and technical problems. Joint Petitioners also argue that the Commission made its decision in a vacuum since it did not put forward its specific regulatory approach for public comment. They include with their petition a report prepared by the NCTA Engineering Committee that addresses the costs and technical considerations associated with input selector switches intended for use with cable service.

10. Joint Petitioners argue that the implementation of the input selector switch requirements would be prohibitively expensive. In this respect, they observe that the NCTA report indicates that the cost of the switches and associated hardware alone would be nearly \$1.4 billion. They further state that the additional costs of antennas and labor to install the switches would increase the total expenditures necessary to comply with the new rules by billions of dollars. NCTA estimates that, purchased in quantity, the price of individual switches will be between \$2.50 and \$4.50, and the cost of necessary connecting hardware for each switch will be \$1.75. They conclude that the per subscriber equipment cost will be a minimum of \$5.00 and that in complex installations (with VCR's) the cost will be \$10.00 per subscriber. On an industry-wide basis, NCTA estimates that the initial capital costs of complying with the switch requirements will exceed \$860 million during the next five years. They also estimate that

the cost of replacing switches that malfunction will cost an additional \$540 million.

11. Joint Petitioners cite three "serious technical problems" which they feel will arise from the input selector switch rule. First, they contend that significant signal leakage will occur. Citing the NCTA study, they claim that "in many cases" switches sent to subscribers for self-installation will be connected incorrectly. As a result, cable signals will be radiated over the subscriber's antenna at high gain, threatening harmful interference with other services, including those serving commercial aviation. Second, they state that signal quality degradation will result due to poor isolation between the A and B sides of switches.⁴ Finally, they maintain that the use of input selector switches would render ineffective certain unspecified features of subscribers' TVs, VCRs, and cable converters, and would make it more difficult to connect peripheral equipment such as video games, computers and stereo decoders. The NCTA study contends that, while the Commission noted in the *Report and Order* that these problems can be overcome by minor equipment modifications and by the increase in sets with built-in switches, the development of a readily available solution does not appear imminent. NCTA declares that, currently, technologies used in electronic switching devices are not practically transferable to stand alone devices and that it will be years before an

⁴ Isolation is the ability of the "A" input side of the switch to discriminate and resist incursion of signals from the "B" input side, and visa versa. According to NCTA, poor isolation makes it impossible to watch programming from one of the two sources without noticeable interference from the other. Joint Petitioners contend that an input selector switch used for selecting between broadcast and cable service must provide at least 90 dB of isolation to protect against signal degradation. They claim that such switches are more expensive than switches offering lower isolation that are suitable for use in conjunction with computers and other peripheral video devices. Joint Petitioners also state that isolation levels deteriorate rapidly after switches are placed in service.

appreciable number of TV sets with built-in switches are on the market. NCTA admits that built-in electronic switches do not suffer from the interference, degradation, short lifespan, and other problems of mechanical input selector switches.⁵ By that time, NCTA observes, a great amount of technically deficient switches will be in home use.

12. Finally, Joint Petitioners contend that compliance with the input selector switch rules will not provide any appreciable public benefits. They argue that most of the switches will not be used for reasons that include inconvenience to the subscriber and subscriber lack of an antenna capable of providing adequate off-the-air reception. Joint Petitioners also claim that cable subscribers will have no need to use a switch because the interim must carry rules will essentially mandate cable carriage of VHF stations that could be received off-the-air and the capability to receive UHF signals off-the air is not affected by the installation of cable service.⁶ They contend that as a result of all of the above considerations, input selector switches installed in the interim period will be merely "standby" devices.

13. Joint Petitioners state that the problems with our approach can be overcome by the adoption of a set of continuing signal carriage requirements and elimination of the input selector switch rules. They submit that the simplest and most direct means of ensuring that cable subscribers have continuing access to broadcast programming would be to eliminate the sunset provision to the signal carriage requirements adopted in the *Report and Order*.⁷ They state that the limited signal carriage rules we adopted

⁵ See Petition by Joint Petitioners, NCTA study, p. 14, n. 6.

⁶ Joint Petitioners state that on many receivers, connection of cable service does not disable the receiver's UHF antenna terminals.

⁷ See 47 CFR §76.64.

represent an appropriate basis for ongoing signal carriage requirements.

14. In the event we are unwilling to accept their principal proposal, Joint Petitioners recommend an alternative approach that would allow cable operators to choose between input selector switches and signal carriage regulation. Under this plan, cable systems would be subject to signal carriage regulation for five years. At the end of this period, or any time thereafter, a cable system would be permitted to elect not to carry all signals required by the must carry rules, but only if it had been installing input selector switches and providing related information to all new subscribers and offering switches to existing subscribers for the previous five years. In addition, a system exercising this option would be required to continue to provide switches and related information to all new subscribers for as long as it seeks to be exempted from signal carriage regulation.

15. Joint Petitioners state that this elective approach differs from the rules adopted in the *Report and Order* in a way that further enhances the discretion of cable operators by giving them the opportunity to determine the time and circumstances in which initiation of the input selector switch and information requirements will best serve the needs of their subscribers. They further submit that under this plan, the direct and indirect costs to the public are likely to be significantly less than those of mandatory switch rules, and that the technical difficulties associated with currently available switches also would be avoided or reduced.

16. Adelphia Communications Corporation, filing jointly with eighteen other cable interests (Adelphia), also requests reconsideration of the input selector switch requirements. Adelphia argues that these rules are unconstitutional for three reasons. First, it claims that,

using the standard articulated in *U.S. v. O'Brien*,⁸ the Commission has failed to demonstrate that the new rules further a substantial federal interest. Adelphia states that the Commission offers little evidence to demonstrate the existence of the alleged problems which would justify the need for further must carry regulation and no evidence at all to support the conclusion that the use of input selector switches will further the asserted governmental interest of maximizing consumer choice. Second, Adelphia submits that the Commission has failed to demonstrate that the new interim rules are the least burdensome alternative available to achieve any substantial federal interest. Adelphia states that a consumer education program alone, without the input selector switch, would be sufficient to achieve the Commission's asserted regulatory goals, and that the Commission has failed to show otherwise. Finally, Adelphia argues that the input selector switch requirements are overbroad for three reasons: 1) they fail to provide an exemption in cases where the input selector switch would serve no purpose (for example, in situations where all local VHF broadcast stations are carried on a local cable system or where no local VHF signals are receivable off-the-air in the cable system area); 2) they should not be applied to new subscribers, since only previously existing subscribers would suffer from the misperception that local broadcast signals cannot still be received through external antennas; and, 3) input selector switches should not be mandatory, but rather optional.

17. Adelphia further contends that the input selector switch requirement violates several provisions of the Cable Communications Policy Act of 1984 (Title VI of the Communications Act). Adelphia claims that the economic burden imposed upon cable operators by the input selector switch rule and the Commission's prevention of cable op-

* 391 U.S. 367, 377 (1986). For further discussion of this constitutional standard, see *infra* at paragraph 63, n. 19.

erators from itemizing the cost of providing an A/B switch on its subscriber billings contravenes national cable communications policy: 1) by ignoring statutory recognition in Section 622 of the Cable Act of the right of cable operators to pass on the costs of regulation to subscribers; 2) by constituting a form of rate regulation prohibited under Section 623 of the Act; and, 3) by imposing a new requirement regarding the content of cable services prohibited by Section 624 of the Act.

18. Like the Joint Petitioners, Adelphia contends that numerous technical problems could result from imposition of the input selector switch rule established in the *Report and Order*. Adelphia states that signal degradation will result because few input selector switches will provide adequate isolation of off-the-air and cable signals, and because the life expectancy of input selector switches is uncertain. Further, Adelphia argues that the use of an input selector switch threatens signal leakage if it is improperly or insecurely installed or if loose fittings occur, thereby forcing unnecessary and expensive service calls. Adelphia notes that at present it is unclear who would ultimately bear the financial burden for those calls, the cable operator or the consumer. Further, it states that other problems associated with so-called "addressable converters" could occur, such as interruption of information flow and automatic disabling of the system. Adelphia also contends that input selector switches present a problem in channel tuning, in that when a cable subscriber switches to off-the-air reception, reception may not be fine-tuned. Moreover, it believes that the complex installation of these switches will increase subscriber confusion and frustration. Finally, Adelphia states that input selector switches will be useless to those subscribers who do not have off-the-air antennas.

19. Turner Broadcasting System, Inc. (TBS), Century Communications Corp., filing jointly with sixteen other cable interests (Century), and the California Cable Television

15
No. 87-1200

Supreme Court, U.S.

FILED

MAR 21 1988

JOSEPH F. SPANOL, JR.

CLERK

In The
Supreme Court of the United States

October Term, 1987

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BOARD OF TRUSTEES FOR ALABAMA STATE
UNIVERSITY; BOARD OF TRUSTEES FOR
ALABAMA AGRICULTURAL AND MECHANICAL
UNIVERSITY; JOHN KNIGHT, *et al.*; and
NORMALITE ASSOCIATION, *et al.*,

Petitioners,

v.

THE UNITED STATES OF AMERICA, *et al.*,

Respondents.

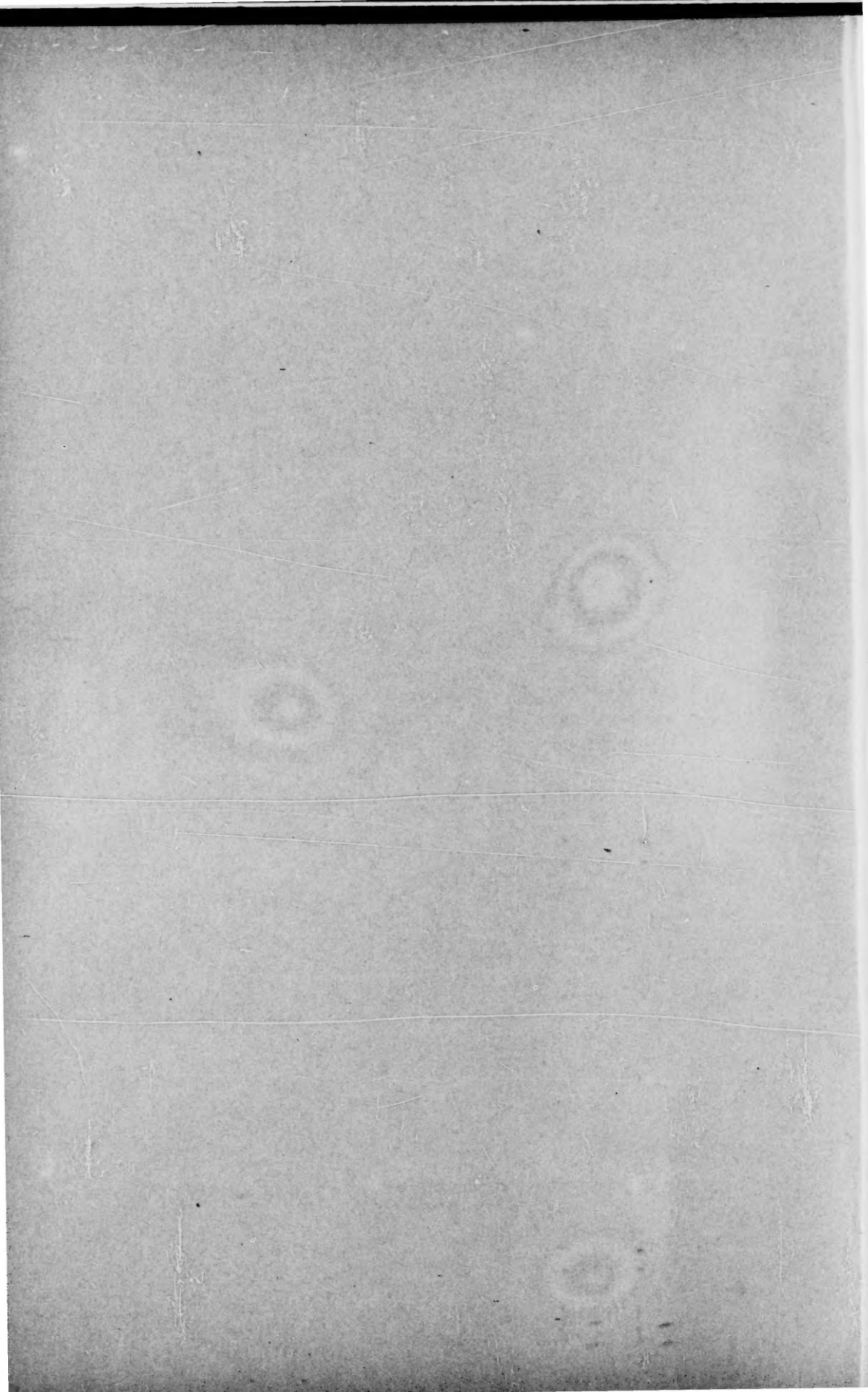
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**RESPONSE OF ALABAMA STATE BOARD OF
EDUCATION; AND WAYNE TEAGUE, STATE
SUPERINTENDENT OF EDUCATION,
RESPONDENTS, TO PETITION FOR
WRIT OF CERTIORARI**

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March, 1988



I. QUESTIONS PRESENTED FOR REVIEW

Respondent Wayne Teague, State Superintendent of Education, presents the following question:

A. Whether the Court of Appeals acted properly when it determined that 28 U.S.C. Sections 455(a) and 455(b) mandated recusal when the District Judge possessed knowledge of and was involved in disputed evidentiary facts of the case and actively participated in the very events and shaped the very facts that became at issue in this suit.

Respondents the Alabama State Board of Education and Wayne Teague, State Superintendent of Education, present the following question:

B. Whether the Court of Appeals acted properly when it once again determined that Alabama State University and Alabama A&M University, as instrumentalities of the State, lacked standing.

II. PARTIES IN THIS COURT AND PARTIES IN THE COURT BELOW

The "Petitioners" in this Court are shown in the caption. The Respondents, in addition to the United States of America, are: The State of Alabama, the Governor of the State of Alabama; the Alabama Public School and College Authority; the Alabama State Board of Education; Wayne Teague, State Superintendent of Education; Auburn University, a public corporation; the Board of Trustees for the University of Alabama, a public corporation; and Troy State University, a public corporation.¹

In the Court of Appeals below, the above named Respondents, excepting the United States of America, were all appellants.

In the Court of Appeals below, Petitioner John Knight, et al., was an appellee. The United States of America was also an appellee.

There were some parties in the District Court which were not parties to the appeal in the Court below. In particular, the "petitioners" Board of Trustees for Alabama State University, a public corporation, and the Board of Trustees for Alabama Agricultural and Mechanical University, a public corporation, were *not* parties in the Court of Appeals. The Court of Appeals has correctly characterized these two entities as being "non-appealing de-

¹ Although Petitioners omitted the United States of America as a respondent in their statement of "Additional Parties In This Court And Parties In The Court Below," pursuant to Rule 19.6, Rules of the Supreme Court of the United States, these Respondents understand the United States of America to be a party respondent in this court.

fendants" in such court. *See* Appendix to Petition for Writ of Certiorari at 1a. [Thus, the statement at page iii of the Petition for Writ of Certiorari that "in the Court below, the petitioners here were all appellees . . ." is erroneous.] The Rules of the Supreme Court of the United States, particularly Rule 19.6, allow petitions for writ of certiorari to be filed only by "parties to the proceeding in the Court whose judgment is sought to be reviewed." Consequently, since Alabama State University and Alabama A&M University were not parties in the Court below, Alabama State and Alabama A&M may not properly seek review of the Court of Appeals decision.

At page iii of the Petition for Writ of Certiorari, Petitioners identify the Normalite Association as being an appellee in the Court of Appeals below. However, this identification is in error since the Normalite Association was *not* a party in the Court of Appeals below. *See* Appendix to Petition for a Writ of Certiorari at p. 1a.

Finally, these Respondents fail to understand that portion of the caption to the Petition for a Writ of Certiorari which refers to the "Normalite Association, et al.," in so far as it speaks to "et al." Although, at page iii, footnote 2 of the Petition for a Writ of Certiorari, Petitioners assert that "the Normalite Association group of intervenors also include the University Legal Defense Fund," the University Legal Defense Fund is not, of course, a "member" of the Normalite Association. Moreover, the University Legal Defense Fund was not a party in the Court of Appeals below. *See* Appendix to Petition for a Writ of Certiorari at p. 1a.

In sum, in so far as who are properly petitioners in this Court, the class of John Knight, et al., is a Petitioner, and was an appellee below. With respect to the Board of Trustees for Alabama State University; the Board of Trustees for Alabama Agricultural and Mechanical University; and the "Normalite Association, et al.," these entities were not parties in the Court of Appeals below. As to the Respondents, they are identified in the first paragraph hereinabove.

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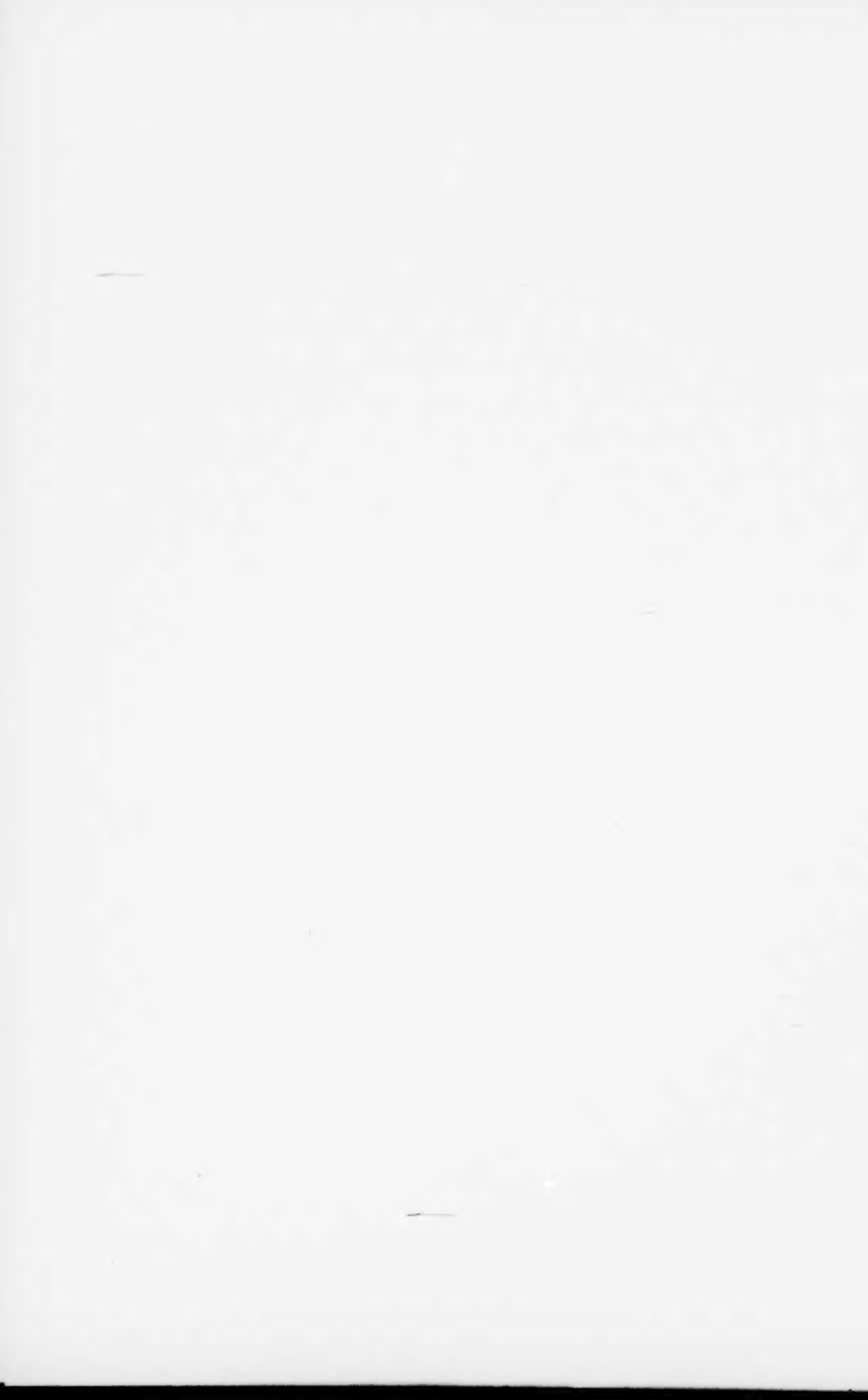
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In The
Supreme Court of the United States
October Term, 1987

BOARD OF TRUSTEES FOR ALABAMA STATE
UNIVERSITY; BOARD OF TRUSTEES FOR
ALABAMA AGRICULTURAL AND MECHANICAL
UNIVERSITY; JOHN KNIGHT, *et al.*; and
NORMALITE ASSOCIATION, *et al.*,

Petitioners,

v.

THE UNITED STATES OF AMERICA, *et al.*,

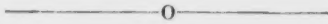
Respondents.

**RESPONSE OF ALABAMA STATE BOARD OF
EDUCATION; AND WAYNE TEAGUE, STATE
SUPERINTENDENT OF EDUCATION,
RESPONDENTS, TO PETITION FOR
WRIT OF CERTIORARI**

V. CITATIONS TO OPINIONS BELOW

These Respondents agree with the statement of the Citation To Opinions Below as presented in the Petition for a Writ of Certiorari. However, such statement omits two further decisions concerning recusal. First omitted is the December 19, 1983, decision of Senior District Judge Hobart Grooms granting the motion to recuse, *United States v. State of Alabama*, — F.Supp. — (N.D. Ala. 1983). R. 2-73. See Appendix at pp. 1A-10A. Also omitted was

Judge Grooms' January 19, 1984, decision in which he vacated his December 19, 1983 Order and recused himself. *United States v. State of Alabama*, — F.Supp. — (N.D. Ala. 1984). R. 2-79. See Appendix at p. 11A.



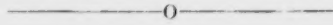
VI. JURISDICTION

Petitioners incorrectly assert that this Court has jurisdiction as to each of their petitions pursuant to 28 U.S.C. Section 1254(1). 28 U.S.C. Section 1254(1) provides for Supreme Court review of cases in the courts of appeals by writ of certiorari only "upon the petition of any *party* to any civil or criminal case . . ." (Emphasis added). Similarly, Rule 19.6, Rules of the Supreme Court of the United States, states that "all parties to the proceeding in the Court whose judgment is sought to be reviewed shall be deemed parties in this Court. . . ." The Board of Trustees for Alabama State University, the Board of Trustees for Alabama Agricultural and Mechanical University, and the "Normalite Association, et al.," were not parties in the Court of Appeals below. Therefore, these non-parties are without the ability to invoke the jurisdiction of this Court.

Petitioner John Knight, et al., was a party in the Court of Appeals below as is contemplated by 28 U.S.C. Section 1254(1) and Rule 19.6.

Consequently, the only question properly presented in the joint Petition for a Writ of Certiorari is that related to recusal, since the Petition's arguments as to standing were

asserted only by the Board of Trustees for Alabama State University and the Board of Trustees for Alabama Agricultural and Mechanical University.



VII. STATEMENT OF THE CASE

Although this case has a long and complicated procedural history, these Respondents' statement of the case focuses upon those matters relevant to a consideration of the two questions presented in the Petition for a Writ of Certiorari. Accordingly, the procedural history of the case is stated in two parts. Presented first is a general overview of the case as a whole, including those matters related to the lack of standing of the Board of Trustees for Alabama State University and the Board of Trustees for Alabama Agricultural and Mechanical University. Then presented are those portions of the proceedings below relevant to recusal. [The Board of Trustees for Alabama State University is hereinafter referred to as "ASU," while the Board of Trustees for Alabama Agricultural and Mechanical University is referred to as "A&M."]

A. *General Overview of Proceedings Below.* In 1978, the Office of Civil Rights (OCR) of the United States Department of Health, Education and Welfare, conducted a Title VI compliance review of Alabama public higher education. In January of 1981, the Governor of Alabama was notified by the U.S. Department of Education of the Department's findings that there remained vestiges of a prior, racially dual system of higher education in Alabama

in violation of Title VI of the 1964 Civil Rights Act. Appendix to Petition for a Writ of Certiorari p. 3a.

In January 1981, John F. Knight, Jr. and other students, graduates, faculty and employees of Alabama State University (the Knight Intervenor class) filed an action styled *Knight v. James* in the Middle District of Alabama seeking the merger of two Montgomery, Alabama area universities into a third Montgomery area institution—the predominantly black ASU.

The United States filed the instant action on July 11, 1983. The Complaint named as defendants the State of Alabama, its Governor, the State Board of Education, the State Superintendent of Education, the Alabama Commission on Higher Education, the Alabama Public School and College Authority, and some ten universities. The Complaint charged violations of Title VI and the Fourteenth Amendment of the United States Constitution based upon the theory that Alabama had failed to remove the vestiges of a prior racially dual system of public higher education. The relief requested was that the defendants be required to develop and implement plans to eliminate such alleged vestiges. Appendix to Petition for a Writ of Certiorari p. 4a.

In September 1983, the Knight class moved to intervene in the instant case. In effect, the Knight class sought to have their claims, previously existing in the Middle District of Alabama case styled *Knight v. James*, incorporated into the instant case then pending in the Northern District of Alabama. The motion to intervene was granted and in January 1985 the Knight class of Montgomery area

ASU students, alumni, and employees, was recertified in the present action.

In July and August of 1983, A&M and ASU moved to be realigned as plaintiffs in order to assert claims against the other defendants. Over the objections of defendants, in September 1983 the District Court granted such motions.

In September 1983, Auburn University and State Superintendent of Education Wayne Teague moved to disqualify the District Judge pursuant to 28 U.S.C. Sections 144 and 455. Further proceedings with respect to the recusal issue are discussed in Section B below.

Trial was held in July 1985, and on December 9, 1985, the District Court issued its memorandum opinion. Said Opinion appears as Appendix C beginning at page 62a of the Appendix to Petition for a Writ of Certiorari. The District Court ordered the Defendants, not including these Respondents, to submit a remedial plan designed to eliminate vestiges of a dual system. On February 14, 1986, the Court of Appeals stayed all further District Court proceedings.

Thereafter, one aspect of the litigation concerning teacher education programs at ASU was considered on appeal to the United States Court of Appeals for the Eleventh Circuit. The issue of whether Alabama State University possessed standing was addressed, with the Court of Appeals determining that ASU lacked standing to assert Title VI and Fourteenth Amendment claims. A petition for writ of certiorari, seeking a review of the standing question was denied by this Court. *United States*

v. State of Alabama, 791 F.2d 1450 (11th Cir. 1986), *cert. denied*, — U.S. —, 107 S.Ct. 1287, 94 L.Ed.2d 144 (1987).

Subsequently, the remaining portions of the case were considered by the Court of Appeals, and on October 6, 1987, the Court of Appeals reversed and remanded the case to the District Court, having found that 28 U.S.C. Section 455 required disqualification of the trial judge and that the "statewide system" approach of plaintiffs was not in compliance with the requirements of "program specificity" and "federally funded programs" of Title VI. The judgment of the Court of Appeals not only disqualified the trial judge and reiterated ASU and A&M's lack of standing, but also found erroneous the entire theoretical foundation for the various plaintiffs' claims.

No petition for rehearing or rehearing *en banc* was made to the Court of Appeals.

The Petition for a Writ of Certiorari presently before this Court was filed by four entities, only one of whom was a party in the Court of Appeals.

B. *Proceedings Concerning Disqualification.* On September 6, 1983, Auburn University moved to disqualify District Judge U. W. Clemon pursuant to 28 U.S.C. Sections 144 and 455. On September 9, 1983, State Superintendent of Education Wayne Teague filed a similar motion. Appendix to Petition for a Writ of Certiorari 12a. These motions alleged bias, extrajudicial knowledge of disputed evidentiary facts (from involvement in litigation styled *Lee v. Macon*), and the appearance of impropriety. R. 26, 33. Judge Clemon denied the motions, ruling that the affidavits supporting the motions were technically insufficient.

Auburn then filed in the Court of Appeals a Petition for a Writ of Mandamus. The Court of Appeals issued the Writ, holding that the affidavits supporting the motions were technically sufficient, and directed that another judge be assigned to hear the recusal proceedings. Appendix to Petition for a Writ of Certiorari at p. 12a; *In re: Auburn University*. — F.2d — (No. 83-7557) (11th Cir., Nov. 10, 1983).

In December 1983, Senior District Judge Hobart Grooms of the Northern District of Alabama granted the motions for recusal, having determined that (1) Judge Clemon's involvement as counsel of record in *Lee v. Macon County Board of Education* gave him personal knowledge of disputed evidentiary facts; and (2) based on other grounds asserted in the motions for recusal, a reasonable person would harbor doubt as to the trial judge's impartiality. *United States v. State of Alabama*, — F.Supp. — (N.D. Ala., Dec. 19, 1983), vacated — F.Supp. — (Jan. 19, 1984). See Appendix at pp. 1A-10A.

Thereafter various statements about Judge Grooms' decision were attributed, whether accurately or not, to Judge Clemon in the *New York Times*, *The Washington Post*, and *The National Law Journal*. In one news media publication Judge Clemon was quoted as calling Judge Grooms' decision on recusal "tenuous" and that "the most charitable thing I can say about it is that it is strange." Judge Clemon was also reported as filing a "motion with Judge Grooms questioning the refusal to let him testify about his relationship to the parties and issues in the case." On January 19, 1984, Judge Grooms vacated his order and recused himself. R. 2-17.

Senior Circuit Judge David Dyer then heard defendants' disqualification motions and denied them. Appendix to Petition for a Writ of Certiorari at p. 13a. Judge Dyer concluded that the affidavits to the motions did not connect Judge Clemon's involvement in *Lee v. Macon* to any aspect of the case. However, Judge Dyer's conclusions were necessarily based upon his own *predictions* as to what would be argued and considered relevant by the trial judge once the trial was conducted. [As the Court of Appeals subsequently determined, during the trial of this case *Lee v. Macon* was made relevant by the positions of the parties, evidence submitted, and rulings upon the admissibility of such evidence.] Judge Dyer then denied Auburn's request to certify the recusal issue for interlocutory appeal under 28 U.S.C. Section 1292(b). Appendix to Petition for a Writ of Certiorari at p. 13a.

During July 1985, trial was held, and on December 9, 1985, the District Court entered an order and opinion. The Court of Appeals then reversed and remanded the case back to the District Court having found, among other things, that disqualification of the trial judge was required. The Court of Appeals determined that disqualification was mandated because of Judge Clemon's knowledge of and involvement in disputed evidentiary facts and issues. Appendix to Petition for a Writ of Certiorari at p. 27a.

A number of grounds for recusal were presented and considered by the Court below. The Court of Appeals held three grounds each to be sufficient to mandate recusal: (1) Judge Clemon's involvement in disputed factual issues surrounding the composition of universities'

governing boards; (2) Judge Clemon's involvement in legislative efforts to improve A&M's physical plant; and (3) Judge Clemon's extrajudicial knowledge of and involvement in disputed evidentiary facts concerning *Lee v. Macon*, particularly the State's treatment of black high school principals. Appendix to Petition for a Writ of Certiorari p. 27a.

In the interest of economy and brevity, the State Superintendent of Education joins in and adopts by reference the statement of the case and arguments supporting recusal as set forth in the response of Auburn University to the Petition for a Writ of Certiorari. However, with respect to the various grounds for recusal, the State Superintendent strongly supports and urges knowledge of disputed evidentiary facts from *Lee v. Macon* to be most important, since it is this matter which most directly affects his interests and the interests of the Alabama State Board of Education. The Alabama State Board of Education and State Superintendent of Education were principle defendants in *Lee v. Macon*. Judge Clemon was once an attorney for plaintiffs in *Lee v. Macon*.

1. *Lee v. Macon—Knowledge and Involvement in Disputed Evidentiary Facts.* The Court of Appeals accurately and fairly described the *Lee v. Macon* recusal ground as follows:

The trial judge's activities as a private lawyer also involved him in the disputed evidentiary facts of this case. Judge Clemon served as an attorney of record for individual plaintiffs in the school desegregation case of *Lee v. Macon County Board of Education*. Filed in 1970, *Lee v. Macon*, included claims under title VI of the Civil Rights Act against many of the

same institutions of higher learning as appear here. These claims took place during periods of time which are relevant to the present case under the “vestiges” theory utilized by plaintiffs. In denying the recusal motion, Judge Clemon stated that he took no part in the portion of *Lee v. Macon* involving institutions of higher education. He noted that the caption of *Lee v. Macon* was used in many smaller actions that grew out of the original suit. According to Judge Clemon, his involvement was restricted to the representation of black high school principals in a race discrimination suit. Even this limited involvement in *Lee v. Macon*, however, left Judge Clemon with knowledge of facts that were in dispute in the instant case. The State’s treatment of black high school principals during the period the trial judge represented their cause became a factual issue at trial. Plaintiff presented testimony about the long, continuous history of racially discriminatory employment practices suffered by black high school principals in Alabama. A study also was offered “for the purpose of demonstrating that there was, during the period covered [1966-1970], a decrease, substantial decrease in the number of percentage in black educators in Alabama in general, and black principals in particular.” Over defendants’ objection, the trial judge accepted in evidence the testimony and exhibits about the status of Alabama’s black high school principals. Judge Clemon admitted this evidence as relevant to prove “that as a vestige of the prior de jure system, the state enforced and pursued racially discriminatory employment practices during the period covered by the study.” On this issue—whether black high school principals suffered racial discrimination—Judge Clemon was once again faced with evaluating evidence of which he had special extrajudicial knowledge.

The language of Section 455(b) is unequivocal: [A judge] shall also disqualify himself in the following circumstances:

(1) Where he has . . . *personal knowledge of disputed evidentiary facts* concerning the proceeding.

The Reporter's Notes to the Code of Judicial Conduct are equally clear: "The Committee also concluded that a judge cannot be, or cannot appear to be, impartial if he has personal knowledge of evidentiary facts that are in dispute." Judge Clemon's disqualification is thus mandated because of his involvement in the disputed factual issues surrounding the composition of defendants' governing boards, the legislative efforts to improve A&M's physical plant, and the State's treatment of black high school principals. Such personal knowledge vitiates the carefully constructed rules of procedure and evidence that ensure deliberate, unbiased fact finding. Litigants also are entitled to have their case decided by a judge who can approach the facts in a detached, objective fashion. Judge Clemon's partisan efforts in these disputes raise legitimate questions about his impartiality in deciding these factual matters. To permit Judge Clemon to decide a case in which he had extrajudicial, personal knowledge of disputed facts would be contrary to the express language and underlying spirit of the statute, as well as the case law.

This court is not impervious to the burden that disqualification at this juncture places on the court system, the litigants, and the people of Alabama. We recognize that new proceedings before a new judge will exact a not inconsiderable cost in time, energy, and legal fees. The intensity and complexity of this litigation, however, is a measure of its significance. We consider the future of higher education in Alabama too important to be decided under a cloud. In a decision such as this one, a decision which will affect millions of Alabamians, public confidence in the judicial system demands a judge free from personal knowledge or biases about the issues before the court. For

this reason, we disqualify Judge Clemon and remand for a new trial.

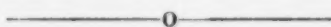
United States v. The State of Alabama, 828 F.2d 1532 (11th Cir.1987), as appearing at the Appendix to Petition for a Writ of Certiorari at pages 26a-29a.

In their Petition for a Writ of Certiorari, at page 10, Petitioners apparently attempt to minimize the importance of Judge Clemon's knowledge of disputed evidentiary facts growing from his participation in *Lee v. Macon* as well as the importance of *Lee v. Macon* to the trial of this case. Petitioners speak of "the introduction in the month-long trial of a single exhibit, out of thousands . . ." However, an examination of the record indicates that far from being a small matter, *Lee v. Macon* was a large factor in the trial of this case. Rather than being a minor matter mentioned just a few times, a review of the transcript of the trial indicates that *Lee v. Macon* by name was mentioned, discussed, or argued about in some form by the Court, counsel, or witnesses at least 89 times. This averages over the 25 days of trial, to approximately 3 and 1/2 times per day. This does not, of course, even begin to take account the many exhibits which may have been offered into evidence and received without counsel or the court's specifically mentioning "*Lee v. Macon*," or the many times *Lee v. Macon* was referenced not by name but by such terms as "three-judge District Court finding" or "the Court order." The brief of the State Superintendent of Education submitted to the Court of Appeals lists each page of the trial court record at which one of these instances concerning *Lee v. Macon* can be found. Further, *Lee v. Macon* was discussed not only with respect to the treatment of black principals and other educators, but also

discussed was: an alleged spirit of defiance to *Lee v. Macon* court orders; the applicability of *Lee v. Macon* to senior institutions; various officials, including these Respondents, reaction to *Lee v. Macon* orders; State Board of Education involvement in *Lee v. Macon*; arguments that the creation of separate boards of trustees for universities in Alabama was an attempt to "get out from" *Lee v. Macon*; compliance reports by various defendants pursuant to *Lee v. Macon*; and instances in which the trial judge attempted to recall various aspects of *Lee v. Macon* orders (for example, "as I recall *Lee v. Macon County*, there is some discussion of the HEW guideline . . ."). In sum, the importance of *Lee v. Macon* was not limited to some off-hand mention of it during the trial, but rather *Lee v. Macon*, within the context of Judge Clemon's personal knowledge of disputed evidentiary facts arising from it, was an integral component in plaintiffs' prosecution of their case.

2. *Timeliness.* In their Petition for a Writ of Certiorari, petitioners attempt to make an issue of the timeliness in which various grounds for recusal were advanced. These Respondents will fully address this matter in the Argument section of this Response. However, this false issue is put to rest rather easily. These Respondents would simply point out that the Court of Appeals held three different grounds of recusal, each sufficient to mandate disqualification of the trial judge. One of these grounds held sufficient was the judge's personal knowledge of disputed evidentiary facts concerning the proceeding, such knowledge resulting from his prior representation of plaintiffs in *Lee v. Macon County Board of Education*. This "*Lee v. Macon* ground" was first pre-

sented in the original motion for recusal filed by the State Superintendent of Education on September 9, 1983. The trial of the case was not held until July of 1985. Thus, there is no question whatsoever that with respect to at least one of the grounds for disqualification, the motion and supporting ground was timely asserted. Therefore, Petitioners' assertion (albeit erroneous) that other grounds for recusal were not timely presented, cannot at all logically affect the disposition of this case.



VIII. SUMMARY OF THE ARGUMENT

Petitioners assert two arguments in support of their Petition for a Writ of Certiorari, one concerning disqualification of the trial judge and one concerning the standing of ASU and A&M. Neither argument merits the granting of the Petition.

With respect to disqualification of the trial judge, the decision of the Court of Appeals below was correct in that the trial judge's activities as an attorney in *Lee v. Macon County Board of Education* involved him in disputed evidentiary facts of this case so as to mandate disqualification under 28 U.S.C. Section 455. Petitioners would have this Court believe that the decision below is in conflict with the decisions of other circuits based upon their allegation that Auburn University was untimely in presenting facts in support of one of the grounds for recusal. However, Petitioner's argument in this regard is erroneous. First, the decision did not turn upon a question of timeliness. The Court of Appeals specifically found that

even if timeliness requirements were to be applied to Section 455(b), that Auburn University and the State Superintendent of Education timely presented their motions for recusal at the earliest stages of the litigation. The Court of Appeals did *not* say that timeliness was not required under Section 455. Rather, it concluded that even assuming *arguendo* that timeliness was required, Auburn and the Superintendent acted timely.

Second, Petitioners gloss over the important fact that the motions for recusal were based upon more than one ground for disqualification. The initial motions alleged three separate and distinct grounds, one of which concerned the trial judge's knowledge of disputed evidentiary facts growing from his being counsel in *Lee v. Macon*. Subsequently, new facts supporting new grounds were discovered by Auburn University and presented. Therefore, even if the new grounds were not presented in a timely fashion, at a minimum the "*Lee v. Macon*" ground was clearly presented timely. The Court of Appeals found that each of three distinct grounds mandated recusal, including the *Lee v. Macon* ground. Consequently, Petitioners' focus upon the timeliness of only one of these grounds ignores the logical reality that in any case the Court of Appeals decision was correct.

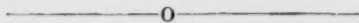
With respect to standing, there are several reasons why Petitioners' arguments are unavailing. First, the standing argument is presented in the Petition for a Writ of Certiorari only by ASU and A&M. As previously mentioned, however, these entities were not parties to the decision below and therefore may not properly participate in the Petition. Second, Petitioners' attempt to construct

an "oath of office" argument to gain standing ignores the fact that only the two *entity* universities were ever parties to this case, and not the individual *members* of the board of trustees of said universities.

In any case, the oath of office argument was not presented to the District Court below. However, it was presented to this Court in the Petition for a Writ of Certiorari in Case No. 86-749. The Petition was denied. *United States v. State of Alabama*, 791 F.2d 1450 (11th Cir. 1986), *cert. denied*, — U.S. —, 107 S.Ct. 1287, 94 L.Ed.2d 144 (1987).

Furthermore, nowhere in the record below does there appear any evidence supporting the idea that the members of the Boards of Trustees of Alabama State University and Alabama A&M University were required to take an oath of office or ever took an oath of office.

Finally, regardless of the oath of office argument, it is clear that as instrumentalities of the State these two universities lack standing to assert claims against these Respondents under the Fourteenth Amendment, Section 1983, or Title VI.



IX. ARGUMENT

A. Recusal

There are three principle reasons why the recusal argument advanced in the Petition for a Writ of Certiorari should not persuade this Court to grant the Writ. First, the decision of the Court of Appeals as to recusal was correct. Second, the cases which Petitioners erro-

neously assert establish a conflict among the decision below and decisions of other circuits, upon even a cursory examination, simply do not establish such a conflict. Rather those cases are entirely distinguishable. Third, due to other aspects of the Court of Appeals decision having a profound impact upon the ultimate retrial of this case, the granting of the Writ would not serve the ends of justice.

1. *The Court of Appeals Decision Was Correct.* The trial judge participated as counsel for private Plaintiffs Lee, et al., in the case of *Lee v. Macon County Board of Education*, 317 F.Supp. 103 (M.D. Ala. 1970), *affirmed in part, modified in part*, 453 F.2d 524 (5th Cir. 1971). *Lee v. Macon* involved claims under Title VI of the Civil Rights Act against the State Board of Education, State Superintendent of Education, many of the universities which are parties to this case, and local elementary-secondary boards of education. As noted by the Court of Appeals, "these claims took place during periods of time which are relevant to the present case under the 'vestiges' theory utilized by Plaintiffs." Appendix to Petition for a Writ of Certiorari p. 26a. In other words, the trial judge was plaintiffs' counsel in an action in which there were claims of race discrimination in Alabama public colleges during a period of time considered by the Petitioners and trial judge as relevant to the present action.

The argument has been made that Judge Clemon's role in *Lee v. Macon* was limited to that portion of the case involving elementary-secondary education, and thus was irrelevant to the trial of this "higher education case." Petition for a Writ of Certiorari p. 10. The implication is apparently that the Court of Appeals discovered "a

single exhibit, out of thousands” which would link up the elementary-secondary aspects of *Lee v. Macon* to higher education issues in this case. This proposition is without merit for two important reasons. First, to talk about generalities of elementary-secondary education versus higher education conveniently ignores the concrete actual knowledge of disputed evidentiary facts which the Court of Appeals found to exist. Second, even if one were to address the broad so-called comparison, far from elementary-secondary education being distinguished from higher education, Plaintiffs themselves asserted that facts which Petitioners term “elementary-secondary matters” were relevant to this case for the purpose of demonstrating discriminatory motive, intent, or practices by the Respondents.

Lee v. Macon involved claims based upon allegations of racial discrimination during the 1950's and 1960's on the part of higher educational institutions formerly administered by the Alabama State Board of Education. These allegations asserted a broad attitude toward race and education (elementary-secondary and higher education) on the part of State officials and institutions as a whole—not just particular universities in isolation from other schools and officials. In other words, a “history” was alleged as the factual basis of intentional discrimination. Petitioners used *Lee v. Macon* as proof of vestiges. Furthermore, although Petitions erroneously consider *Lee v. Macon* as being irrelevant for purposes of recusal, they destroy their own views by having used *Lee v. Macon* as an integral part of their proof. As detailed in the brief of the State Superintendent in the Court of Appeals, *Lee v. Macon* was mentioned, discussed, or argued in some

form by the Court and counsel at least 90 times, probably more, during the trial of this case. Over the twenty-five days of trial, there was an average of approximately three and a half times per day that evidence related to *Lee v. Macon* was submitted, or the impact of *Lee v. Macon* was discussed. Surely Petitioners cannot be serious in their attempt at minimizing the significance of *Lee v. Macon* to this case. If *Lee v. Macon* was so irrelevant, one must consider why Petitioners thought it so necessary to the prosecution of their claims.

Also, in their Petition for a Writ of Certiorari, Petitioners seem to prefer to speak almost exclusively of Judge Dyer's opinion on recusal. However, that opinion is not due the significance which Petitioners would subscribe to it. Judge Dyer's opinion was not the only place in which recusal was considered. Rather, the recusal motions were considered thoroughly by a number of judges on more than one occasion. Further, after trial of the case the Court of Appeals, with the benefit of all arguments and the entire record, carefully and thoroughly examined the issue. Judge Dyer, addressing recusal before trial, could only *predict* whether *Lee v. Macon* would become relevant to the trial of this case. The Court of Appeals, however, had the benefit of examining the entire record, including the evidence submitted, and rulings of the trial judge on whether "*Lee v. Macon*" evidence was sufficiently relevant to be admissible. Obviously, therefore, the proper decision for examination as to the relevance of *Lee v. Macon* is that of the Court of Appeals, not Judge Dyer.

2. *Timeliness.* Petitioners are in error when they assert in their Petition that the decision below is in con-

flict with the decisions of the other Circuits regarding the timeliness of a motion filed pursuant to 28 U.S.C. Section 455. Petitioners assert that “the decision below conflicts in a number of respects with the decisions of other Circuits which have adopted procedural rules to prevent abuse of 28 U.S.C. Section 455. In allowing a litigant to raise new grounds for recusal without time limit, the decision below is in conflict with decisions of the Second Circuit . . . , the Fifth Circuit . . . , and the Ninth Circuit . . .” (citations omitted). However, Petitioners’ argument in this regard must fail for two reasons. First, the decision below is in fact *not* in conflict with the decisions of other circuits. Second, and more importantly, the instant case does not turn on the question of timeliness.

In making the above-referenced argument, Petitioners cite three cases apparently for the proposition that a requirement of timeliness should be read into 28 U.S.C. Section 455: *In re International Business Machines*, 618 F.2d 923, 932 (2d Cir. 1980); *Delesdernier v. Porterie*, 666 F.2d 116 (5th Cir. 1982), *cert. denied*, 459 U.S. 839 (1982); and *United States v. Conforte*, 624 F.2d 869 (9th Cir.) *cert. denied* 449 U.S. 1012 (1980). Without focusing its attention upon Section 455(b) as distinguished from 455(a), the Second Circuit in *In re International Business Machines*, reached the general conclusion that motions made under 455 must be made in a timely manner. Of course, the context within which this conclusion was reached should be noted. The case began in January 1969 and upon ending in the District Court in 1979, in the words of the Second Circuit, “A mammoth record of trial transcript and exhibits has been assembled. To the best of our knowledge no litigation has taken so much time and involved such

expense.” Only after said marathon was run was a post-trial motion for recusal made. Similarly, in *Delesdernier v. Porterie, supra*, the Fifth Circuit held that a motion for disqualification of the trial judge which was raised for the first time on appeal after two full trials on the merits was obviously untimely. This decision was made in the context of disqualification pursuant to Section 455(a). Likewise, in *United States v. Conforte, supra*, a party was not permitted to raise for the first time on appeal a *motion* for recusal when he was aware of the *grounds* supporting the motion during pendency of the matter in the trial court. The party also failed to remind the trial judge of the matter even when the question of the judge’s qualification to sit was expressly discussed before trial. *Id.* at 879.

One can draw from these three cases a general proposition that a party who becomes aware of facts and circumstances justifying or requiring recusal may not rest a long time on such knowledge and only make a motion for disqualification on appeal or after a judgment adverse to it. With such a proposition, particularly as it relates to Section 455(a),² these Respondents have no disagreement.

² The cases considering the applicability of timeliness requirements to motions made under 28 U.S.C. Section 455 tend to occur more often than not in motions made under sub-section (a) of Section 455 rather than sub-section (b). For example, the Eleventh Circuit has applied a timeliness requirement to recusal motions made pursuant to Section 455(a). *United States v. Slay*, 714 F.2d 1093 (11th Cir. 1983), cert. denied, 464 U.S. 1050, 104 S.Ct. 729, 79 L.Ed. 2d 189 (1984). See also Note, Disqualification of Federal Judges for Bias or Prejudice, 46 U.Chi. L.Rev. 236, 265 (1978). Thus it may well be that considerations of timeliness do not apply to sub-section (b), at least not to the same degree as they apply to sub-section (a). Regardless, however, the motions made in the instant case were clearly timely.

Yet, such a general rule has no application to, nor any conflict with the decision of the Court of Appeals below.

At footnote 49 of the decision below the Court of Appeals thoroughly examined the issue of whether considerations of timeliness apply to Section 455. The Court did not reject the notion of timeliness under Section 455. Rather, it concluded that even if assuming *arguendo* a requirement for timeliness existed here, the parties seeking disqualification acted in a timely manner. The Court noted the following:

Appellants here were not acting to delay or to speculate on a favorable substantive judgment in the interim. *Motions to disqualify Judge Clemon were filed at the earliest stages of the litigation and aggressively prosecuted throughout.* Appellants did not discover relevant information about Judge Clemon's activities as a State Legislator until late in the litigation, and raised this ground for disqualification at the first available moment . . . Given the critical importance of the appearance of impartiality guaranteed by Section 455, we refuse to adopt the cramped interpretation of this statute asserted by Appellees here. (Emphasis added).

Consequently, it is evident that in no way did the Court below act contrary to decisions of other circuits applying a requirement of timeliness. The Court simply reasoned that if Auburn University and the State Superintendent were required to act timely, they did so. They did so in making a motion during the very earliest stages of the litigation, asserting the grounds in support of the motion of which they were aware at the time, and vigorously pursuing disqualification. In no way did Auburn and the Superintendent attempt to improperly apply Sec-

tion 455. To the contrary, in the face of massive and complex litigation of great importance to the citizens of Alabama, Auburn and the Superintendent made their position clear from the outset. In sum, the decision is not in conflict with the decisions of other circuits so as to justify review by his Court.

Petitioners' argument concerning the timeliness of disqualification motions must also fail because the decision below did not, in fact, turn upon timeliness. That is, the motions for recusal were made by the State Superintendent of Education and Auburn University early on in the litigation—well before trial. These motions alleged more than one ground in support of recusal, including the ground that the judge possessed extrajudicial knowledge of disputed evidentiary facts from his involvement as counsel in *Lee v. Macon*. Subsequently, Auburn discovered additional relevant information about Judge Clemon's activities as a State Legislator and presented it in a timely fashion. Petitioners assert that the judge should not have been disqualified due to their belief that Auburn inordinately delayed its presentation of the additional facts it subsequently discovered concerning the judge's activities as a Legislator. However, even assuming *arguendo* that Auburn was untimely in presenting these additional facts (although Auburn was *not* untimely), recusal is still required. Recusal is still required because the original motion for recusal was made long before trial at a time which no reasonable person could call other than timely. That motion included the assertion of knowledge of disputed evidentiary facts concerning *Lee v. Macon*. The Court of Appeals found that this ground was, itself, suf-

ficient to mandate recusal. Consequently, Petitioners' focus upon alleged untimeliness in presenting one ground for a recusal cannot affect the validity and correctness of the Court of Appeals' decision to disqualify Judge Clemon. That is, even if one ground for a recusal was presented untimely, the remaining grounds were timely and still mandate recusal. Each ground for disqualification—involvement in disputed factual issues surrounding the composition of defendants' governing boards, the legislative efforts to improve A&M's physical plant, *and* the State's treatment of black high school principals—independently necessitate disqualification.

3. *Review does not sufficiently serve the ends of justice.* As a final observation concerning recusal, these Respondents would respectfully note that even if Petitioners were able to point out some error in the Court of Appeals decision as to recusal, the case is still not worthy of review by this Court in view of the unnecessary burden it would impose upon the Court's extremely valuable and very limited resources. Specifically, the Court of Appeals reversed and remanded the case to the District Court not only due to its conclusion that the trial judge must be disqualified, but also because of its conclusion that Plaintiff the United States had not prosecuted its case in compliance with the program specificity requirements of Title VI. In other words, the Court of Appeals held that the action could not be prosecuted against the entire State "system" of higher education in Alabama without specifying which programs and activities within the individual universities receive federal funds and how those particular programs and activities were discriminatory. Because Plaintiffs presented their case in a manner inconsistent

with the requirements of Title VI, the case was properly remanded to the District Court with directions that the Complaint of the United States be dismissed without prejudice. Therefore, it is obvious that regardless of the conclusions of the Court of Appeals related to recusal, the case must at least in part begin again in the District Court and proceed to a new trial. Consequently, whether Judge Clemon should have been disqualified becomes, at least in a financial and efficiency of justice context, a purely academic inquiry. Whether Judge Clemon were to remain as judge, or a new judge were to handle the case, the case must begin anew in the District Court. For this Court to grant review in such a circumstance, especially given the fact that the decision below is not in conflict with the decisions of other circuits, would amount to this Court devoting its important time and energies to a case of far less importance than others presently pending on petitions for writ of certiorari.

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B. STANDING³

With regard to the standing arguments presented in the petition, this case is not without its history. That is, Petitioners simply assert unmeritorious arguments which when previously urged upon this Court as reasons to grant a writ of certiorari (No. 86-749), the Court found insufficient to invoke this Court's review.

³ The Respondents adopt by reference the arguments made by Respondents Auburn University and the University of Alabama concerning standing.

Moreover, the Petition for a Writ of Certiorari should not be granted based upon Petitioners' standing argument since the standing issue is not before this Court. That is, in the Petition only ASU and A&M attempt to present the standing question. Yet, as previously discussed, ASU and A&M were not parties in the Court of Appeals below and are therefore without authority to present a petition for a writ of certiorari to this Court. However, as a secondary response, even assuming *arguendo* that Petitioners' standing argument is properly before this Court, the argument must fail for the following reasons.

Petitioners apparently argue that "public officials, like petitioners in this case . . ." who believe that some State entity may be interfering with their perceived individual, personal duties to obey their oaths to uphold the United States Constitution gain standing from such a belief. Petition for a Writ of Certiorari p. 26.

First, "Petitioners" apparently forgot who they are. The Petitioners are the two State *entities* (bodies corporate) named the Board of Trustees for Alabama State University and the Board of Trustees for Alabama Agricultural and Mechanical University. The Petitioners are *not* the individual members of said Boards of Trustees. The individual Board members have never, in any capacity or any pleading in this case, been defendants or plaintiffs. Indeed, ASU's Motion for Realignment, ASU's Motion for Leave to File Amended Claims, ASU's Amended Claims, A&M's "Cross-Claims," A&M's Amended Claims, and A&M's Supplement to Amended Claims (each of which appears in the Appendix to this Response), all

speak in terms of the claims of the two instrumentalities of the State of Alabama—the Board of Trustees for Alabama State University and the Board of Trustees for Alabama Agricultural and Mechanical University. ASU and A&M's pleadings in the District Court do not even themselves assert any harm to the individual Board members.

Petitioners ASU and A&M have constructed an argument for standing (not presented in the District Court) which is based upon the theory that the individual Board members are being forced to violate their oaths to uphold the Constitution. However, given the above observation that the parties are the State entities, Boards of Trustees of ASU and A&M (and not their individual Board members), it is obvious that Petitioners do not even face the predicament they suppose. That is, the State entities ASU and A&M do not, and of course cannot, take an oath of office. Consequently, they cannot use a supposed oath of office allegedly given to non-party Board members as a method for belately discovering grounds for standing.

State entities (as opposed to officials or employees) do not take oaths of office. State entities, therefore, cannot use the oath of office theory to create standing where it does not already exist. For this reason alone, the judgment of the Court of Appeals below that ASU and A&M lacked standing under the Fourteenth Amendment, Title VI, or 42 U.S.C. Section 1983 was correct.

Secondly, Petitioners' standing argument must fail because there is no evidence in the Record below of any expressed statutory requirement upon the Boards of Trustees of ASU and A&M, nor their individual members, to subscribe to an oath to uphold the Constitution.

Third, Petitioners' oath of office argument was, rather curiously, not presented in the District Court below. In none of their pleadings did ASU or A&M argue that they were forced to violate their oath of office. Appendix at pp. 12A-66A.⁴ It was in ASU's previous petition for a writ of certiorari, in Case No. 86-749, that Petitioners first attempted to bootstrap their alleged standing by claiming a violation of their oath of office. The Petition was denied. *United States v. State of Alabama*, 791 F.2d

⁴ These respondents do not suggest or imply that due to the absence of the above, that the members of the Boards of Trustees of ASU and A&M may legitimately violate provisions of the Constitution. Rather, the absence of the above illustrates the lengths at which ASU and A&M will travel to attempt to construct a legitimate basis for their argument that a State created entity may sue its creator.

This is not to say that State agencies, including public school districts, have never been allowed to assert equal protection in claims against the state that created them. Several cases, most notably *Brewer v. Hudson School District No. 46*, 238 F.2d 91 (8th Cir. 1956), stand for the proposition that local school boards may sue the state to protect the constitutional rights of their students. *Akron Board of Education v. State Board of Education of Ohio*, 490 F.2d 1285 (6th Cir. 1974), cert. denied, 417 U.S. 932 (1974). These cases represent the single instance in which the federal courts have allowed State agencies to sue their creator—where the institution is suing to enjoin a specific legislative act in order to protect the rights of its individual students and where the State has allegedly placed the agency's officials in the position of either violating a State law or a constitutional duty to desegregate. Notably these cases show that the State agency's position only confers standing in the Article III sense, not a right to equal protection in the agency or institution, itself. See, e.g., *Akron Board of Education v. State Board of Education of Ohio*, *supra*, as asserted by ASU and A&M. ASU and A&M do not assert in their Petition any attempt to sue in order to protect the rights of individual students, as opposed from their own institutional preferences. Regardless, such an assertion would be rather ludicrous since the students are themselves a party to this case as the "Knight-Intervenors."

1450 (11th Cir. 1986), *cert. denied*, — U.S. —, 107 S.Ct. 1287, 94 L.Ed.2d 144 (1987).

Fourth, in any event, ASU and A&M have no constitutional duty to file lawsuits. They cite no specific interference by defendants, nor do they cite any State law or regulation placing them in the posture of violating the United States Constitution in order to comply with State law. Moreover, any constitutional duty which the non-party members of the Board of Trustees might have would be to conform their own individual conduct with that of the Constitution—not to affirmatively seek to change the conduct of others.

Finally, ASU and A&M simply have no standing to assert Fourteenth Amendment, Section 1983, or Title VI claims against these Respondents. As the Eleventh Circuit Court of Appeals stated in the previous appeal growing from the instant controversy, “ASU thus had no standing to sue or seek to enjoin the Alabama State Board of Education under Section 1983 and the Fourteenth Amendment. . . . We turn next to the question of whether ASU has a right to sue the State under Title VI. . . . We conclude that no such right of action exists.” *United States v. State of Alabama*, 791 F.2d 1450, 1456 (11th Cir. 1986), *cert. denied*, — U.S. — 107 S.Ct. 1287, 94 L.Ed.2d 144 (1987). Obviously, A&M is in no different position than ASU. See also *Town of Ball v. Rapides Parrish Police Jury*, 746 F.2d 1049, 1051 n.1 (5th Cir. 1984); *Appling City v. Municipal Elec. Authority of Ga.*, 621 F.2d 1301, 1308 (5th Cir. 1980), *cert. denied*, 449 U.S. 1015 (1980); *Commonwealth of Pa. v. Porter*, 659 F.2d 306, 327 n.3 (3rd Cir. 1981) *en banc* (standing recognized on other grounds).

X. CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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No. 87-1200

In The
Supreme Court of the United States
October Term, 1987

BOARD OF TRUSTEES FOR ALABAMA STATE
UNIVERSITY; BOARD OF TRUSTEES FOR
ALABAMA AGRICULTURAL AND MECHANICAL
UNIVERSITY; JOHN KNIGHT, *et al.*; and
NORMALITE ASSOCIATION, *et al.*,
Petitioners,

v.

THE UNITED STATES OF AMERICA, *et al.*,
Respondents.

**APPENDIX TO RESPONSE OF
ALABAMA STATE BOARD OF EDUCATION;
AND WAYNE TEAGUE, STATE SUPERINTENDENT
OF EDUCATION, RESPONDENTS, TO
PETITION FOR WRIT OF CERTIORARI**

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March, 1988



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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,)	
)	
	Plaintiff	) CIVIL ACTION
)	
vs.	)	NO. 83-C-1676-S
)	
THE STATE OF ALABAMA;	)	(Filed Dec. 19,
et al.	)	1983)
)	
Defendants)	

OPINION ON MOTIONS FOR RECUSAL

Auburn University filed an affidavit herein under Title 28 U.S.C. § 144 challenging the propriety of Judge U. W. Clemon to sit as the trial judge in this action.

Following a hearing, Judge Clemon ruled that the affidavit was insufficient and that he was qualified to sit. Auburn filed a petition for a writ of mandamus. The Court of Appeals ruled that the affidavit was legally sufficient and stated that "The affidavit set forth sufficient factual allegations to require that the 'judge shall proceed no further therein, but another judge shall be assigned to hear such proceedings,' " citing *Parrish v. Board of Commissioners of Alabama State Bar*, 524 F.2d 98 (Fifth Circuit en banc).

The matter was remanded with directions that another judge be assigned to hear the recusal proceedings.

The Chief Judge of the Court has requested this judge to hear the proceedings.

The Court has held a hearing. The only additional matters tendered upon the hearing were: the petition for writ of mandamus, the responses of Alabama State University, Alabama A&M University and of the United States, the reply memorandum of Auburn, the revised criteria of the Department of Health, Education and Welfare as to acceptable plans to desegregate state systems of public higher education, and compilations of assignments of the various school systems located in the Northern District of Alabama to the several judges of this Court, after the transfer from the Middle District of that part of *Lee v. Macon County* involving those systems. Evidentially speaking, these documents add little to the factual status of the case, or suffer to change the results that might otherwise be reached.

The predecessor of Section 144 was construed in *Berger v. United States*, 255 U.S. 22 (1921), wherein the Court stated:

“We are of opinion, therefore, that an affidavit . . . upon its filing, if it show the objectionable inclination or disposition of the judge, which we have said is an essential condition, it is his duty to ‘proceed no further’ in the case. And in this there is no serious detriment to the administration of justice, nor inconvenience worthy of mention; for of what concern is it to a judge to preside in a particular case? of what concern to other parties to have him so preside? and any serious delay of trial is avoided by the requirement that the affidavit must be filed not less than ten days before the commencement of the term.”

Section 455 of Title 28 and Section 144 are to be construed *in parimateria*, *Davis v. Board of School Commissioners of Mobile County*, 517 F.2d 1044, 1052 (5th Cir.

1975). The former section extended the disqualifications from "personal bias or prejudice" (§ 144) "to any proceeding in which the judge's impartiality might reasonably be questioned." (§ 455a). As the court noted in *Parrish*, Section 455a is general "and does not rest on the personal bias and prejudice stricture of Sections 144 and 455(b)(1)."

In *Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1111 (5th Cir.1980), the court stated that the language: "where his impartiality might be reasonably questioned, sets up an objective standard rather than the subjective standard set forth in the prior statute through the use of the phrase 'in his opinion.'" The statute was amended in 1974, omitting the phrase "in his opinion."

In *Potashnick* the court further ruled:

"Clearly, the goal of the judicial disqualification statute is to foster the appearance of impartiality. Cf. E. Thode, Reporter's Notes to Code of Judicial Conduct 60-61 (1973). This overriding concern with appearances, which also pervades the Code of Judicial Conduct and the ABA Code of Professional Responsibility, stems from the recognized need for an unimpeachable judicial system in which the public has unwavering confidence. As this court has noted, 'the protection of the integrity and dignity of the judicial process from any hint or appearance of bias is the palladium of our judicial system.' *United States v. Columbia Broadcasting System, Inc.*, 497 F.2d 107, 109 (5th Cir. 1974). Any question of a judge's impartiality threatens the purity of the judicial process and its institutions.

"Because 28 U.S.C. § 455(a) focuses on the appearance of impartiality, as opposed to the existence in fact of any bias or prejudice, a judge faced with a

potential ground for disqualification ought to consider how his participation in a given case looks to the average person on the street. Use of the word "might" in the statute was intended to indicate that disqualification should follow if the reasonable man, were he to know all the circumstances, would harbor doubts about the judge's impartiality."

"The language of the new statute eliminates the so-called 'duty to sit.' The use of 'might reasonably be questioned' in section 455(a) (emphasis added) clearly mandates that it would be preferable for a judge to err on the side of caution and disqualify himself in a questionable case."

The 1974 amendment of Section 455 was to bring the statutory grounds for disqualification in conformity with Canon 3c of the Code of Judicial Conduct, the first sentence of which is couched in the identical language as that of Section 455(a).¹

Judge Clemon commendably acknowledged the standard prescribed in 455(a) and Canon 3c of the Code of Judicial Conduct in his confirmation hearing before the Senate Judiciary Committee (p. 448), when Senator Baucus inquired of him what his attitude would be with respect to a legal matter that would come before him that involved a relative or close friend. He responded:

"Mr. Clemon. I would think that involving a relative that I should recuse myself in every case, and within the third degree of relationship, should recuse myself with respect to any in-laws who may be involved.

1. Canon 3c of the Code of Judicial Conduct was adopted by the Judicial Conference of the United States in April 1973. See *Potashnick* footnote 2 at 1108.

Indeed, I would go further than that and say, in any case involving a relative of mine, I would think that I should recuse myself from the case.

In terms of friends, it would depend on the nature of the relationship. If it is a close personal friend of mine, I would think that that would be a situation in which my impartiality might reasonably be questioned, and that in such a case, I should recuse myself.

Indeed, if it is not a close personal friend, but if it is a friendship which might give rise to an appearance of impropriety, I would think that I should recuse myself."

In the memorandum opinion of September 26, 1983, wherein Judge Clemon overruled the motion to disqualify himself, he stated:

"While a reasonable person, reading the affidavits of movants and their counsel and accepting their allegations as true, would certainly harbor doubts as to my impartiality . . ."

Auburn's affidavit sets forth there main grounds for disqualification.

The foremost of these appears to be Judge Clemon's personal relationship with former Senator Stewart. Mr. Stewart is now an attorney of record for the Alabama A&M University, an original defendant herein, but now realigned, by order of Judge Clemon, as a party plaintiff.

2. To this statement he added: "[W]hen the true facts and circumstances are known and considered in their totality, such doubts are dispelled." Judge Clemon addressed the Section 455 issue in his initial opinion rendered on September 3, 1983, 571 F.Supp. 958, 962, but reserved a ruling thereon. The September 26, 1983, ruling followed the submission of the Section 455 issue.

The realignment, according to a letter memorandum filed with Judge Clemon on the motion for realignment by Mr. Stewart's firm, was sought "that more forms of relief (e.g. attorney's fees) will be available to it and so that it will have more impact and influence on the action which is brought in large part to benefit A&M." The allowance of attorney's fees for the realigned plaintiff for services for the Stewart firm in the litigation, claim for which is made in A&M's motion for realignment, will be at issue in the case.

Judge Clemon was serving his second term in the Alabama State Senate at the time of his nomination for the judgeship now held by him. During his first four-year term, Mr. Stewart served as a fellow Senator in that body. Judge Clemon was one of four chosen by the two Alabama Senators for nomination out of eighteen recommended by a nominating commission established by the two to fill three vacancies in the Northern District of Alabama and one in the Middle District. Judge Clemon's confirmation met rather formidable opposition before the Judiciary Committee. The hearing was by no means routine as was the case of two of the nominees before the Committee. Senator Stewart appeared before the Committee, recommended Judge Clemon, and actively supported his confirmation during the hearing.

In the course of the hearing Judge Clemon stated that he would think "aspirants for judicial positions should not seek to unduly influence his Senator by making a significant contribution to the campaign." He further stated that (prior to his nomination) he and his wife had early on contributed \$500.00 to Mr. Stewart's senate campaign be-

cause he had been his supporter for some time. He also stated that after the race was over and Stewart had accumulated a fairly substantial campaign debt, that he himself had left over campaign funds, and that after obtaining permission from his contributor to transfer the funds, he transferred the funds from his account to Senator Stewart.

The situation presented by these facts goes considerably beyond that presented in *Warner v. Global Natural Resources PLC*, 545 F.Supp. 1298 (S.D. Ohio). In that case Marvin Warner prompted by a call from Senator Metzenbaum called Senator Heflin of the Senate Judiciary Committee and stated that in his opinion Judge Spiegel (the presiding judge in *Warner v. Global*) would make a good judge of the court. Warner had never had any intimate or personal relationship with the judge, who didn't know about the call at the time.

Another ground for recusal presented by the motion involves Section 455(b)(1), which provides that the judge shall disqualify himself (1) "where he has . . . personal knowledge of disputed evidentiary fact concerning the proceedings."

Judge Clemon was counsel of record in *Lee v. Macon County* in the Northern District of Alabama for various plaintiffs and actively participated in certain phases of the case. *Lee v. Macon County* was first instituted in the Middle District. The suit included claims under Title VI of the Civil Rights Act of 1964 against institutions of higher learning, including Alabama A&M University, Florence State University (now the University of North Alabama), Jacksonville State University and Livingston University, all of which institutions are located in the North-

ern District, and all of which are parties in this action. Auburn and certain other institutions of higher learning not administered by the State Board of Education were not parties in the suit.

Lee also included ninety-nine local school systems, the many Trade Schools and Junior Colleges, and the institutions of higher learning set out above, as well as certain other higher educational institutions not located in the Northern District.

Particularly, since the realignment, A&M is waging a common battle with the plaintiffs in *Lee v. Macon County* relating to discrimination in higher education, though not in the same case. *Lee v. Macon County* has had many ramifications and has left its footprints in many records, trial and appellate. For the Court at this juncture to follow its many trials would unduly lengthen this opinion.

In *W. Clay Jackson Enterprises, Inc. v. Greyhound Leasing & Financial Corporation*, 467 F.Supp. 801 (D.C. Puerto Rico), notwithstanding the fact that another judge had ruled that Judge Torruella was not disqualified, Judge Torruella stated that:

“[A] reasonable doubt has been raised in this Judge’s mind regarding the *possibility* that facts which may have come to his knowledge while acting as labor counsel in a collective bargaining negotiation in 1969, may be ‘disputed evidentiary facts concerning [this] proceeding’ within the meaning of 28 U.S.C. § 455(b)(1). [Emphasis supplied]

“... [W]e believe that such doubt must be resolved in favor of disqualification.”

With Judge Clemon's resourcefulness, diligence, and expertise in the legal arena, he would hardly overlook any of the facts and issues in *Lee v. Macon County*.

The other matter presented is that of Judge Clemon's children, as members of a putative class, who would or might be affected by the outcome of the proceedings in this case.

It has been held that a member of a class is a party under Section 455(b)(4) and that a judge related to such party must recuse himself. *In re Cement Antitrust Litigation*, 688 F.2d 1297 (9th Cir. 1982), affirming 515 F.Supp. 1076 (D.C. Ariz.).

There was a motion in this case to intervene by certain persons to assert a class action. However, the motion was later withdrawn. As the Court views the situation, the possible contingency of Judge Clemon's children becoming parties, absent a class action claim in this case, is too remote at this point in time to present a judicial issue meriting relief on this ground.

After considering the entire record and briefs, and applying the statutes and the decisions construing them, the Court is of the opinion, based upon the first two grounds, singularly and in totality, and so holds that the average reasonable person, knowing all the circumstances, would harbor a doubt as to Judge Clemon's impartiality.

The motion is due to be and the same is hereby granted.

The motion of Wayne Teague, as State Superintendent of Education, be and the same is likewise granted,

10A

since it involves the same issues presented for recusal as those presented by Auburn's motion.

Done this 19th day of December, 1983.

/s/ H. H. Grooms
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Southern Division

UNITED STATES OF AMERICA,)	
et al.,)	
)	Defendants.
)	NO. CV
vs.)	83-C-1676-S
)	
)	(Filed January
THE STATE OF ALABAMA,)	19, 1984)
et al.,)	
)	Defendants.

RECUSAL

The undersigned hereby recuses himself from further participation as a judge herein.

This the 19th day of January, 1984.

/s/ H. H. Grooms

APPENDIX B

UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF ALABAMA
 Southern Division

UNITED STATES OF AMERICA,)	
	Plaintiff,)
	)	NO. CV
vs.	)	83-C-1676-S
)	
THE STATE OF ALABAMA,	)	(Filed January
et al.,	)	19, 1984)
	Defendants.)

Order Granting Motion for Rehearing

After carefully considering the many documents filed herein, including motions to intervene and briefs, the undersigned has reached the conclusion that it is in the best interest of all concerned that further proceedings related to the recusal of the Honorable U. W. Clemon, other than entry of this order, be conducted by another judge, one who is not a member of this court. In order to afford another judge a clear slate upon which to write, the court is of the opinion that the motions for a new trial filed herein by Alabama A & M University and Honorable U. W. Clemon, be and each of them are hereby GRANTED, and the Opinion and Order of December 19, 1983, be and the same is hereby VACATED.

This the 19th day of January, 1984.

/s/ H. H. Grooms

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,)	Plaintiff,)	
	)	CASE NO.
vs.	)	CV-83-C-1676-S
)	
THE STATE OF ALABAMA,)		(Filed August
et al.,)		5, 19—)
_____	Defendants.)	

MOTION OF DEFENDANT BOARD OF TRUSTEES
FOR ALABAMA STATE UNIVERSITY FOR
REALIGNMENT AS PARTY-PLAINTIFF

The Board of Trustees for Alabama State University (hereinafter called "ASU") hereby moves to be realigned and treated as a party-plaintiff in this case. In support of this motion, defendant ASU represents and shows unto the Court the following:

1. Complaint in this case alleges, *inter alia*, that since 1953 the defendants, by their policies and practices, have maintained and perpetuated a dual system of public higher education based on race, and have failed to take affirmative steps to remove the vestiges of the dual educational system resulting from their policy of racial segregation in education.

2. The defendant ASU, recognizing the continued existence of a racially dual system of higher education in the Montgomery geographical area, proposed, through the administrative officers of Alabama State University, in

January, 1980, the merger of Auburn University at Montgomery (hereinafter "AUM") and Troy State University at Montgomery (hereinafter "TSUM") into Alabama State University under the control and governance of the Board of Trustees for Alabama State University and with the name Alabama State University.

3. By resolution adopted January 15, 1981, the defendant ASU reaffirmed merger of AUM and TSUM into Alabama State University as the most equitable and effective method to disestablish the racially dual system of higher education in Montgomery. (A copy of the resolution is attached hereto as Exhibit I, incorporated herein by reference, and made a part hereof as if herein set forth in full.)

4. Defendant ASU has thus asserted, and is asserting a right to relief similar to that sought by plaintiff.

5. Defendant ASU, through the administrative officers of Alabama State University, has exerted every effort available to it to completely desegregate the faculty, staff and student body of Alabama State University.

6. Questions of law and fact common to defendant ASU and plaintiff will arise in this action.

7. Defendant ASU has an interest in the subject of this action in obtaining essentially the same relief demanded by plaintiff.

8. No party's rights will be adversely affected by realignment as the interest of defendant ASU coincides with that of plaintiff.

9. The interests of the co-defendants are antagonistic to the interests of the defendant ASU.

WHEREFORE, defendant ASU respectfully prays that this court take cognizance of this Motion, and after careful consideration of the matters and things set forth herein, enter an Order, pursuant to and in accordance with Federal Rules of Civil Procedure, Rules 20 and 21, realigning defendant ASU as party-plaintiff in this action.

Respectfully submitted,

GRAY, SEAY & LANGFORD

By: /s/ SOLOMON S. SEAY, JR.

Solomon S. Seay, Jr.

352 Dexter Avenue

Montgomery, Alabama 36104

(205) 269-2563

Attorney for Board of Trustees for
Alabama State University

CERTIFICATE OF SERVICE

I hereby certify that I have served copies of the foregoing MOTION OF DEFENDANT BOARD OF TRUSTEES FOR ALABAMA STATE UNIVERSITY FOR REALIGNMENT AS PARTY-PLAINTIFF upon the following persons by placing copies of same in the United States Mail, first-class postage prepaid, on this the 3rd day of August, 1983:

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Dement & Wise
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Montgomery, AL 36101

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The Alabama Commission
on Higher Education
The State of Alabama
The Alabama Public School
and College Authority

Glenn Powell
P. O. Box 295
Tuscaloosa, AL 35401
and

FOR: The University
of Alabama

Paul Skidmore
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Charles Coody
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FOR: Wayne Teague
Alabama State Board
of Education

FOR: Auburn University

FOR: Jacksonville State
University

FOR: Livingston University

FOR: Alabama A&M
University

FOR: Troy State University

FOR: The University of
Montevallo

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/s/ Solomon S. Seay, Jr.

EXHIBIT 1

POLICY ON UNIVERSITY DESEGREGATION

WHEREAS, the U. S. Department of Education, Office of Civil Rights, has notified Governor Fob James that the State of Alabama has failed to eliminate vestiges of the former *de jure* racially dual system of higher education, and

WHEREAS, the State is given a limited time in which to submit to the Department a statewide desegregation plan; and

WHEREAS, any such plan would involve Alabama State University.

BE IT THEREFORE RESOLVED, That the Board of Trustees for Alabama State University reaffirm the po-

sition that the seniority of Alabama State University as an autonomous, full-service senior institution in the Montgomery area be recognized in any future desegregation plan as is now provided under the statutes of Alabama (H. B. 494, Act 79-461).

BE IT ALSO RESOLVED, That the Board focuses attention on its status as the only Montgomery-based university governance body established under Alabama statutes and calls upon the Legislature and the Governor for such additional powers and duties as would be necessary for management and control of all higher education offerings in the event of change in the governance of the Montgomery branches of Auburn University and Troy State to accommodate any plan for further desegregation, academic or economic improvement.

BE IT FURTHER RESOLVED, That in event of consolidation or merger and/or any change of identity involving Alabama State and the Montgomery branches of Auburn University and Troy State, the Board hereby calls upon the Legislature and the Governor to safeguard and preserve the name "ALABAMA STATE UNIVERSITY."

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
vs.	)	CV 83-C-1676-S
)	
STATE OF ALABAMA; GEORGE)	
C. WALLACE, Governor of the)	
State of Alabama, et al.,)	
)	
Defendants.)	

MOTION OF REALIGNED PARTY-PLAINTIFF
BOARD OF TRUSTEES FOR ALABAMA STATE
UNIVERSITY FOR LEAVE TO FILE
AMENDED CLAIMS

Realigned Party-Plaintiff Board of Trustees for Alabama State University ("ASU") moves for leave to file the attached Amended Claims, based on the following:

1. The attached Amended Claims more specifically state claims which are subsumed within the more general allegations of the Complaint of the United States, which was adopted by ASU in its motion for realignment, as well as claims which have been raised by the Complaint in Intervention of John F. Knight, et al.

2. These Amended Claims are further prompted by recent developments and new requirements that had been proposed by the Defendant State Board of Education regarding eligibility of students for admission in teacher education programs, recommendations that certain teacher

education programs at ASU not be approved because of racially discriminatory faculty requirements, and the State Board's racially discriminatory administration of scholarship and student loan funds.

3. These Amended Claims should not cause a delay in any ultimate trial date in this matter.

Respectfully submitted this 21st day of November, 1984.

SEAY & DAVIS
731 Carter Hill Road
P. O. Box 6215
Montgomery, Alabama 36106

BY: /s/ Solomon S. Seay
SOLOMON S. SEAY
TERRY DAVIS

Attorneys for Realigned Plaintiffs
Alabama State University

CERTIFICATE OF SERVICE

I do hereby certify that on this 21st day of November, 1984, a copy of the foregoing pleading was served upon counsel of record:

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by depositing same in the United States mail, postage pre-paid.

/s/ Solomon S. Seay, Jr.
ATTORNEY FOR PLAINTIFFS

APPENDIX E

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DISTRICT**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
vs.	)	CV 83-C-1676-S
)	
STATE OF ALABAMA; GEORGE)	
C. WALLACE, Governor of the)	
State of Alabama, et al.)	
)	
Defendants.)	

**AMENDED CLAIMS OF REALIGNED PARTY-
PLAINTIFF BOARD OF TRUSTEES FOR
ALABAMA STATE UNIVERSITY**

Realigned party-plaintiff Board of Trustees for Alabama State University ("ASU") hereby files the following amended claims:

Jurisdiction

1. ASU hereby adopts paragraph 1 of the Knight Intervenors' Complaint.

Allegations of Fact

2. ASU adopts paragraph 14-33 of the Knight Intervenors' Complaint.

3. The defendant State Board of Education requires that students seeking admission to teacher education pro-

grams achieve a score of at least 16 on the American College Testing program (the ACT) taken prior to entering the teacher education program, or achieve an equivalent score on another standardized test approved by the defendant State Board of Education taken at the end of the sophomore year. This formal test score requirement for admission to teacher education programs has a severe, adverse racial impact on black students and, correspondingly, on traditionally black institutions, including ASU.

4. The defendant State Board of Education instituted its formal test score requirements for entry into teacher education programs in 1972 with full knowledge that it would disqualify nearly half of the students who were previously admitted to teacher education programs and that most of those disqualified would be black students.

5. Evidence of the adverse racial impact of the State Board's test requirement for entry in teacher education programs (the "ACT-16 requirement") can be seen in the rapidly declining numbers of students who have been enrolling in teacher education programs at the traditionally black institutions of higher education in Alabama. The number of ASU students enrolling in teacher education programs in 1983-84 dropped to less than half the number who were enrolling in 1979-80.

6. By contrast, the State Boards ACT-16 requirement for entry into teacher education programs has little effect on most of the traditionally white institutions, many which, like Auburn University, already restrict enrollment to entering freshmen with ACT scores of 18 or higher.

7. ACT's publisher warns colleges that students who, for a variety of reasons, are educationally disadvantaged will score lower on the ACT, and that the educationally disadvantaged are comprised predominantly of minority students. Information obtained through discovery in this action confirms that the average ACT scores of black students entering institutions of higher education in Alabama are substantially lower than those of white students and lower than the minimum 16-score required by the defendant State Board for entry into teacher education programs:

a. For example, the mean (average) composite ACT scores for Auburn University, main campus show:

Academic Year	White Students*		Black Students	
	Mean (Average) Score	Dist. of Scores (Range)	Mean (Average) Score	Dist. of Scores (Range)
1970-71	23.4	14-33	18.4	14-24
1975-76	22.6	12-33	17.9	11-26
1980-81	22.3	12-33	19.1	8-29
1983-84	22.8	12-34	20.1	16-29

*All non-black freshman students. Includes Asians, foreign nationals, Hispanics, native Americans, and white students.

b. At the University of North Alabama, the mean and median scores for 1983-84 first-time freshman were:

	<u>Mean</u>	<u>Median</u>
Black	11.88	11
White	11.72	18

c. The mean ACT scores for entering freshmen at the University of South Alabama are:

	<u>Black</u>	<u>White</u>
1969-70	15.0	20.9
1970-71	15.2	20.5
1971-72	13.5	20.7
1972-73	15.3	20.7
1973-74	14.5	20.6
1974-75	14.9	21.6
1975-76	16.9	21.1
1976-77	16.7	21.9
1977-78	16.9	20.8
1978-79	16.9	20.6
1979-80	17.0	20.8
1980-81	16.7	20.6
1981-82	16.2	20.4
1982-83	15.5	20.3
1983-84	16.2	20.2

d. The average ACT score among the University of South Alabama's black students is 17.1. The national average is 12.6.

e. In 1977, the University of South Alabama's admissions policy stated "students with ACT scores of less than 16 or SAT combined scores of less than 800 are rarely admitted." The efficacy of this policy can be seen in the rising mean ACT scores for black entering freshmen since the policy went into effect.

8. The ACT has never been validated as a reliable predictor of whether Alabama students will perform successfully in teacher education programs.

9. The publisher of the ACT also admonishes colleges using test results that students who are educationally disadvantaged and who score lower on the ACT may nevertheless be fully capable of performing satisfactorily at the college level if they are provided special assistance. An institution that is willing and able to assist educationally disadvantaged students is advised to select more such students than would be indicated by test scores, and the publisher recommends that all students be selected with appropriate attention given to qualifications in addition to test scores.

10. ASU has always accepted as part of its mission the need to provide an opportunity to educationally disadvantaged students to acquire the skills that will enable them to perform satisfactorily at the college level. Other institutions, such as Auburn, the University of Alabama and the University of South Alabama, have failed or refused to share the burden of helping educationally disadvantaged students overcome their developmental problems and have restricted admission to students who score higher on the ACT. Consequently, the defendant State Board's ACT-16 requirement uniquely disadvantages ASU and other institutions who are attempting to provide a full and equal opportunity to all students in Alabama, particularly to minority students who have been the victims of racial discrimination at the elementary-secondary level.

11. An advisory committee appointed by the defendant State Board recommended that teacher education pro-

gram admission requirements be increased even further at all levels. ASU alleges, on information and belief, that the defendant State Board will consider a resolution to increase from 16 to 18 the minimum ACT score required for admission to teacher education programs at its February 1985 meeting. Such action taken will aggravate the discrimination already being practiced against black students and traditionally black institutions and will further cripple the ability of traditionally black institutions to provide equal educational opportunity to all students who are or who may become capable of performing successfully at the college level.

12. Exercising its authority under *Ala. Code, Sec. 16-23-14* (1975), the defendant State Board has also prescribed minimum requirements for faculty members in programs for instructional support personnel. Approval of an institution's teacher education program is contingent upon meeting these requirements which include the following:

a. That they hold an earned doctorate, or the equivalent, with a major emphasis in the field of specialization in which the major workload is assigned;

b. That they have a minimum of three years of successful experience as a practitioner in the instructional support area in which the major workload is assigned;

c. That at least one faculty member in each instructional support area in which a program leading to certification is offered shall hold an earned doctorate with an area of specialization in that field.

13. In May 1984, a review team appointed by the defendant State Superintendent of Education recommended

that no students be admitted to the following programs at ASU because faculty members in these programs did not meet some or all of the foregoing faculty requirements:

a. The Class A and Class AA Superintendent Program: of the two faculty members in this program at ASU, both have the appropriate doctorates, but neither has three years experience as superintendent. One faculty member with an appropriate degree and three years of experience as a superintendent is required for the Class A program; two such faculty members are required for the Class AA program.

b. The Class A and Class AA General Supervisor Program: of the two faculty members in this program at ASU, both lack the required doctoral level preparation in supervision, and both lack the three years of experience as a supervisor. One faculty member with appropriate preparation and experience is required for the Class A program; two such faculty members are required for the Class AA program.

c. The Class A and Class AA Reading Supervisor Program: of the two faculty members in this program at ASU, both have the required doctoral level preparation, but neither has three years of experience as a reading supervisor. One faculty member with appropriate doctoral level preparation and three years of experience as a reading supervisor is required for the Class A program; two such faculty members are required for the Class AA program.

d. The Class A and Class AA Library Media Program: the one faculty member in this program at ASU is fully qualified, but State Board regulations require a

minimum of two faculty members meeting the aforesaid requirements for the Class A program. No additional faculty member is required for the Class AA program.

14. The State Board's requirements for faculty in programs for instructional support personnel and the recommendations of the May 1984 review team at ASU have an adverse racial impact on black students and traditionally black institutions, including ASU, and they perpetuate the vestiges of the prior *de jure* system of racial segregation at all levels of public education in Alabama. Because of historical segregation and racial discrimination against black students and black professionals, there are disproportionately few black educators who can satisfy faculty requirements for instructional support personnel programs, namely, three years experience as a superintendent, supervisor, reading supervisor or supervisor of library media and doctoral level preparation in those specific fields of specialization.

15. The faculty requirements for instructional support personnel programs are not necessary for the successful operation of such programs or for the successful preparation of students in those programs.

16. The requirements for faculty in instructional support personnel programs have both the purpose and the effect of discriminating against black students, black professionals and traditionally black institutions.

17. The Alabama Legislature has appropriated monies to be distributed by the State Department of Education to Alabama students as academic scholarships and loans at institutions of higher education. The defendants have administered this scholarship fund in a racially discriminatory manner.

18. Since the Legislature appropriated the scholarship funds, all the scholarships have been awarded to white students and none awarded to a black student, even though many black students applied.

19. Defendants' administration of the scholarship and loan authorized by the Alabama Legislature has both the purpose and effect of discriminating against black students and traditionally black institutions, including ASU.

First Federal Cause of Action

20. ASU hereby adopts paragraphs 34 and 35 of the Knight Intervenors' Complaint.

Second Federal Cause of Action

21. ASU hereby adopts paragraph 36 of the Knight Intervenors' Complaint.

Third Federal Cause of Action

22. The defendant State Board's ACT-16 requirement for entry into teacher education programs violates the rights of ASU and the black students ASU serves guaranteed by Title VI of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000d, for the following reasons:

a. Most of the black students seeking admission to the teacher education program at ASU have been denied an equal opportunity for quality education by elementary-secondary school systems of the defendant State of Alabama, many of which continue to perpetuate the vestiges of the *de jure* segregated system and have not achieved unitary status.

b. Defendants cannot demonstrate that the disproportionately lower scores achieved by blacks on the ACT are not due to the present effects of past intentional and/or *de jure* segregation at all levels of public education in Alabama, elementary, secondary and higher education.

c. Defendants cannot demonstrate that the ACT-16 requirement is necessary to remedy the continued effects of *de jure* segregation.

d. Defendants have not eliminated the vestiges of *de jure* segregation in Alabama's system of higher education, and the transition to a unitary system must not be accomplished by placing a disproportionate burden upon black students or traditionally black institutions of higher education by reducing the educational opportunities currently available to blacks.

Fourth Federal Cause of Action

23. For the reasons set out in the preceding paragraph, defendants' ACT-16 requirement for entry into teacher education programs violates the rights of ASU and the students ASU seeks to serve guaranteed by the Equal Educational Opportunities Act, 20 U.S.C. Sec. 1703.

Fifth Federal Cause of Action

24. For the reasons set out in paragraph 14 *supra*, the defendants' ACT-16 requirement for entry into teacher education programs violates the fourteenth amendment of the United States Constitution. The ACT-16 requirement also violates the fourteenth amendment for the following reasons:

a. The defendants initiated and maintain the ACT-16 requirement for racially discriminatory purposes.

b. The ACT-16 requirement is arbitrary and capricious and does not achieve a legitimate state interest.

c. The ACT has not been validated for the manner in which it is used under the defendants' ACT-16 requirement for entry into teacher education programs, and defendants cannot establish that the ACT is a fair test of what has in fact been taught in the elementary-secondary public school systems of Alabama. For these reasons, the ACT-16 requirement is fundamentally unfair.

Sixth Federal Cause of Action

25. The defendant State Board's faculty requirements for instructional support personnel programs violate the rights of ASU, the black students ASU serves and black professionals employed by ASU that are guaranteed by Title VI of the Civil Rights Act of 1964, 42 U.S.C. Section 2000(d) for the following reasons:

a. Because of historical and continuing racial discrimination in public education in Alabama, disproportionately few black professionals have had the opportunity to obtain both the prior experience and field of specialization requirements set out in the State Board regulations.

b. Defendants cannot demonstrate that faculty grants are necessary to achieve the purposes to which they have been enacted.

c. Defendants cannot demonstrate that the faculty requirements for instructional support personnel programs are necessary to remedy the continued effects of *de jure* segregation.

d. Defendants have not eliminated the vestiges of *de jure* segregation in Alabama's system of higher education, and the transition to a unitary system must not be accomplished by placing a disproportionate burden upon black students or upon traditionally black institutions of higher education by reducing the educational opportunities currently available to blacks.

Seventh Federal Cause of Action

26. For the reasons set out in the preceding paragraph, defendants' faculty requirements for instructional support personnel programs violate the rights of ASU, the students ASU seeks to serve, and the black professionals ASU employs, that are guaranteed by the Equal Educational Opportunities Act, 200 U.S.C. Sec. 1703.

Eighth Federal Cause of Action

27. For the reasons set out in paragraph 25, *supra*, and because they have a racially discriminatory purpose, the defendants' minimum faculty requirements for instructional support personnel programs violate the fourteenth amendment to the United States Constitution.

Ninth Federal Cause of Action

28. The defendants' administration of the monies allocated by the Alabama Legislature for scholarships and loans discriminates on the basis of race against ASU and the black students ASU seeks to serve, in violation of their rights under Title VI of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000(d); the Equal Educational Opportunities Act, 20 U.S.C. Sec. 1703, and the fourteenth amendment to the United States Constitution.

First State Cause of Action

29. ASU hereby adopts paragraphs 37-39 of the *Knight* Intervenor's Complaint.

Prayer for Relief

30. ASU hereby adopts paragraphs 40-42 in the Prayer for Relief set out in the *Knight* Intervenor's Complaint.

31. ASU further prays the Court will grant a declaratory judgment that the defendants' ACT-16 requirement for entry into teacher education programs, the defendants' minimum faculty requirements for instructional support personnel programs and the defendants' administration of appropriated scholarship and loan funds violate the federal statutory and constitutional rights of ASU, the black students it seeks to serve, and black professionals employed by ASU.

32. ASU further prays the Court will enter preliminary and permanent injunctions enjoining the defendants, their agents, attorneys, employees, successors and those acting in concert with them or at their direction from:

- a. Continuing to enforce the ACT-16 requirement, and
- b. Continuing to enforce the minimum faculty requirements for instructional support personnel programs.
- c. Continuing to administer scholarship and loan funds in a racially discriminatory manner, and
- d. From failing to provide make-whole relief to ASU and all the black students who have been injured in

the past by the unlawful and unconstitutional ACT-16 requirement.

Respectfully submitted this 21st day of November, 1984.

SEAY & DAVIS
732 Carter Hill Road
P. O. Box 6215
Montgomery, Alabama 36106

By: SOLOMON S. SEAY, JR.
SOLOMON S. SEAY
TERRY DAVIS
Attorneys for Realigned Plaintiffs
Alabama State University

CERTIFICATE OF SERVICE

I do hereby certify that on this 21st day of November, 1984, a copy of the foregoing pleading was served upon counsel of record:

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De Ment and Wise
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by depositing same in the United States mail, postage prepaid.

SOLOMON S. SEAY, JR.
Attorney for Plaintiffs

APPENDIX F

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

UNITED STATES OF)	
AMERICA,)	
)	
Plaintiff,	)	CASE NO.
	)	CV 83-C-1676-S
v.)	
)	
THE STATE OF ALABAMA,	)	(Filed July 26,
et al.,	)	1983)
)	
Defendants)	
)	

**MOTION TO REALIGN OR IN THE ALTERNATIVE
FOR LEAVE TO FILE CROSS CLAIMS**

The Board of Trustees for Alabama A & M University (hereinafter "Alabama A & M") hereby moves to be realigned and treated as a party-plaintiff based on the following:

1. The racially dual system of public higher education described in the First Claim in the Complaint has discriminated against and damaged Alabama A & M, a traditionally black institution of higher education, in that, among other things, it has been denied its fair share of the capital and operation funds necessary for it to carry out its mission in a manner consistent with comparable traditionally white institutions of higher education. To correct this discrimination, the Court should require the expenditure of substantial, supplemental funds, according to proof of need and amount, to enhance Alabama A & M so that it can attract more students of all races.

2. Likewise, the allegations of the Second Claim demonstrate discrimination against and damage to Alabama A & M. The University of Alabama in Huntsville (hereinafter "UAH") was established and expanded for racially discriminatory reasons. Especially, the expansion of UAH into education, business, computer science, and other non-engineering programs has damaged Alabama A & M and limited the ability of Alabama A & M to attract students of all races. At least, UAH should be enjoined from continuing to offer programs in education, business, computer science, and other non-engineering areas, and from expanding into any and all other programs. Also, for racially discriminatory reasons, Auburn has been treated more favorably than Alabama A & M in all land grant functions, including but not limited to agricultural teaching and research and farm extension services. To correct this racially discriminatory treatment, the Court should order that Alabama A & M be given control of all land grant functions in North Alabama, while leaving Auburn with those functions in South Alabama. An equalization of land grant funding is necessary to effect this proper distribution of land grant functions.

3. The claims of Alabama A & M are brought under 41 U.S.C. §§ 1981 and 1983 and the Fourteenth Amendment to the United States Constitution with subject matter jurisdiction under U.S.C. § 1343, in addition to being under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.* In addition to the relief requested herein

and the original Complaint, Alabama A & M requests the award of attorney's fees and such other relief as may be appropriate.

4. Alternatively, Alabama A & M moves for leave to file the cross claims attached hereto.

Respectfully submitted,

STEWART, FALKENBERRY &
WHATLEY

Suite 305, 2100 16th Avenue South
Birmingham, AL 35205
(205) 933-0300

By: /s/ Joe R. Whatley, Jr.

By: /s/ Donald W. Stewart

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing motion has been served on the following by depositing same in the U.S. Mail, postage prepaid, on this 25 day of July, 1983:

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For: George C. Wallace
The Alabama Commission
on Higher Education
The State of Alabama
The Alabama Public School
and College Authority

Glenn Powell, Esquire
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For: The University of
Alabama

Charles Coody, Esquire
 Assistant Attorney General
 Department of Education
 State of Alabama
 Montgomery, AL 36130

For: Wayne Teague
 Alabama State Board
 of Education

Solomon Seay, Jr., Esquire
 Gray, Seay & Lanford
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For: The Board of Trustees
 for Alabama State
 University

Thomas Thagard, Esquire
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 Montgomery, AL 36101

For: Auburn University

Walter Merrill, Esquire
 500 1st National Bank Bldg.
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For: Jacksonville State
 University

Fred Ingram, Esquire
 Thomas, Taliaferro, Forman,
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For: Livingston University

Richard F. Calhoun, Esquire
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For: Troy State University

Frank Ellis, Jr., Esquire
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For: The University of
 Montevallo

Robert Potts, Esquire
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For: The University of
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 Civil Rights Division
 Department of Justice
 Washington, D.C. 20530

/s/ Joe R. Whatley, Jr.
 Joe R. Whatley, Jr.

IN THE UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF ALABAMA
 SOUTHERN DIVISION

UNITED STATES OF)	
AMERICA,)	
)	
Plaintiff)	
)	
v.	)	CASE NO.
	)	CV 83-C-1676-S
THE STATE OF ALABAMA,)	
et al.,)	
)	
Defendants)	

CROSS CLAIMS

The Board of Trustees for Alabama A & M University (hereinafter "Alabama A & M") hereby files the following cross claims:

1. These claims are filed pursuant to the ancillary jurisdiction of this Court. These claims are also brought under 42 U.S.C. §§ 1981 and 1983 and the Fourteenth Amendment to the United States Constitution, with subject matter jurisdiction being based on 28 U.S.C. § 1343, in addition to being under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*

2. Each and every allegation, claim, and request for relief in the original complaint are hereby realleged and incorporated herein by reference.

3. The racially dual system of public higher education described in the First Claim in the Complaint has discriminated against and damaged Alabama A & M, a traditionally black institution of higher education, in that, among other things, Alabama A & M has been denied its fair share of the capital and operational funds necessary for it to carry out its mission in a manner consistent with comparable traditionally white institutions of higher education. To correct this discrimination, the Court should require the expenditure of substantial, supplemental funds, according to proof of need and amount, to enhance Alabama A & M so that it can attract more students of all races.

4. Likewise, the allegations in the Second Claim of the original Complaint demonstrate discrimination against and damage to Alabama A & M. UAH was established and expanded for racially discriminatory reasons. Especially, the expansion of UAH into education, business, computer science, and other non-engineering programs has damaged Alabama A & M and limited the ability of Alabama A & M to attract students of all races. At least, UAH should be enjoined from continuing to offer programs in education, business, computer science, and other non-engineering areas, and from expanding into any and all other programs. Also, for racially discriminatory reasons, Auburn has been treated more favorably than Alabama A & M in all land grant function, including but not limited to agricultural teaching and research and farm extension services. To correct this racially discriminatory

treatment, the Court should order that Alabama A & M be given control of all land grant functions for North Alabama, while leaving Auburn with those functions for South Alabama. An equalization of land grant funding is necessary to effect this proper distribution of land grant functions.

5. These cross claims are brought against all other defendants to this action.

WHEREFORE, Alabama A & M request that the Court order the relief requested in the original Complaint, the relief requested in the body of this complaint, an award of attorney's fees and costs, and such other relief as the Court may consider appropriate.

Respectfully submitted,

STEWART, FALKENBERRY &
WHATLEY

Suite 305, 2100 16th Avenue South
Birmingham, AL 35205
(205) 933-0300

By: /s/ Joe R. Whatley, Jr.

By: /s/ Donald W. Stewart

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing instrument has been served on the following by depositing same in the U.S. Mail, postage prepaid, on this 25th day of July, 1983:

Ira Dement, Esquire
Dement & Wise
P. O. Box 4163
Montgomery, AL 36101

For: George C. Wallace
The Alabama Commission
on Higher Education
The State of Alabama
The Alabama Public School
and College Authority

Glenn Powell, Esquire P. O. Box 295 Tuscaloosa, AL 35401	For: The University of Alabama
Charles Coody, Esquire Assistant Attorney General Department of Education State of Alabama Montgomery, AL 36130	For: Wayne Teague Alabama State Board of Education
Solomon, Seay, Jr., Esquire Gray, Seay & Langford 352 Dexter Avenue Montgomery, AL 36104	For: The Board of Trustees for Alabama State University
Thomas Thagard, Esquire P. O. Box 78 Montgomery, AL 36101	For: Auburn University
Walter Merrill, Esquire 500 1st National Bank Bldg. Anniston, AL 36201	For: Jacksonville State University
Fred Ingram, Esquire Thomas, Taliaferro, Forman, Burr & Murray 1600 Bank for Savings Bldg. Birmingham, AL 35203	For: Livingston University
Richard F. Calhoun, Esquire P. O. Box 965 Troy, AL 36081	For: Troy State University
Frank Ellis, Jr., Esquire P. O. Box 587 Columbiana, AL 35051	For: The University of Montevallo
Robert Potts, Esquire 107 East College Street Florence, AL 35630	For: The University of North Alabama
Maxey Roberts, Esquire The University of South Alabama Mobile, AL 36688	For: The University of South Alabama
William Bradford Reynolds Assistant Attorney General Tenth and Constitution Avenue Washington, D.C. 20530	

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Thomas M. Keeling
Harvey L. Handley, III
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Civil Rights Division
Department of Justice
Washington, D.C. 20530

/s/ Joe R. Whatley, Jr.
Joe R. Whatley, Jr.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF)	
AMERICA,)	
)	
Plaintiff)	
v.	)	CASE NO.
)	
THE STATE OF ALABAMA,	)	CV 83-C-1676-S
et al.,)	
)	
Defendants)	
)	
)	

AMENDED CLAIMS

The Board of Trustees for Alabama A & M University hereby files the following amended claims:

1. These claims are filed pursuant to the ancillary jurisdiction of this Court. Subject matter jurisdiction also is based on 28 U.S.C. § 1343, in addition to the statutes cited in the specific claims described herein. In addition to asserting claims against defendants in the above styled action, A & M is asserting its Tenth and Eleventh Claims against the United States of America.

2. The following abbreviations will be used throughout these claims:

- a) "State" refers to The State of Alabama;
- b) "Board" refers to The Alabama State Board of Education;

- c) "A & M" refers to the Board of Trustees for Alabama A & M University;
- d) "ASU" refers to The Board of Trustees for Alabama State University;
- e) "Auburn" refers to Auburn University;
- f) "AUM" refers to Auburn University in Montgomery;
- g) "JSU" refers to Jacksonville State University;
- h) "LU" refers to Livingston University;
- i) "TSU" refers to Troy State University;
- j) "TSUM" refers to Troy State University in Montgomery;
- k) "UM" refers to The University of Montevallo;
- l) "UA" refers to The Board of Trustees for the University of Alabama;
- m) "UAH" refers to the University of Alabama in Huntsville;
- n) "UAB" refers to The University of Alabama in Birmingham;
- o) "UNA" refers to The University of North Alabama;
- p) "USA" refers to The University of South Alabama;
- q) "ACHE" refers to The Alabama Commission on Higher Education; and
- r) Where the context indicates, the use of an abbreviation for a university may refer to its main or oldest campus. For example, UA may refer to the University of Alabama in Tuscaloosa.

3. Each and every allegation, claim, and request for relief in the original complaint are realleged and incorporated herein by reference.

4. The additional defendants added by these claims are R. C. Bamberg, Robert H. Harris, Michael B. McCartney, Bill Nichols, John W. Pace, III, Frank P. Samford, Jr., Morris Savage, John Denson, Charles M. Smith, III, and Henry B. Stegall, II, in their official capacities as members of the Board of Trustees of Auburn University, a public corporation; T. Massey Bedsole, O. H. Delchamps, Jr., Aaron M. Aronov, Winston M. Blount, Yetta G. Samford, Jr., Cleophus Thomas, Jr., Garry Neil Drummond, John T. Oliver, William H. Mitchell, Martha H. Simms, Frank H. Brombey, Jr., Thomas E. Rast, Samuel Earle G. Hobbs, Sandra Hullett, Ernest G. Williams in their official capacity as members of the Board of Trustees of the University of Alabama; Thomas Braswell in his official capacity as comptroller of the State of Alabama and as comptroller of the Alabama Special Education Trust Fund; he is the official responsible for disbursing the State funds described herein.

5. In 1862, Congress enacted the First Morrill Act, 12 Stat. 503 *et seq.*, 7 U.S.C. § 301 *et seq.*, providing grants of land to state for endowments to establish at least one college of agricultural and mechanic arts. On December 31, 1868, the State of Alabama accepted the appropriation under the First Morrill Act, and on or about February 26, 1872, the Legislature of the State of Alabama authorized an agricultural and mechanical college at Auburn. This agricultural and mechanical college was the predecessor to Auburn. Auburn, but not A & M, is recognized in the Constitution of the State of Alabama, Amendment No. 161, which replaced § 266 of the 1901 Constitution. Under § 266 and Amendment No. 161, the Legislature has recog-

nized that "the trustees . . . and their successors in office, are constituted a body corporate under the name of Auburn University, to carry into effect the purposes and intent of the congress of the United States in the grants of land by the act of July 2, 1862." Code of Alabama 1975 § 16-48-1. The Alabama Constitution of 1901 was adopted in large part for racially discriminatory reasons.

6. In 1890, Congress enacted the Second Morrill Act, 26 Stat. 417 *et seq.*, 7 U.S.C. § 321 *et seq.* The Second Morrill Act authorized the establishment of separate land grant colleges for Blacks. Section one of the Second Morrill Act contained the following provision:

No money shall be paid out under this act to any State . . . for the support and maintenance of a college where a distinction of race or color is made in the admission of students, but the establishment and maintenance of such colleges separately for white and colored students shall be held in compliance with the provisions of this act if the funds received in such State . . . be equitably divided as hereinafter set forth: Provided, That in any State in which there has been one college established in pursuance of the act of July second, 1862, and also in which an educational institution of like character has been established, or may be hereafter established, . . . for the education of colored students in agriculture and the mechanic arts, . . . or whether or not it has received money heretofore under the [1862] act to which this act is an amendment, the legislature of such State may propose and report to the Secretary of the Interior a just and equitable division of the fund to be received under this act between one college for white students and one institution for colored students established as aforesaid, which shall be divided into two parts and paid accordingly, and thereupon such institution for colored students shall be entitled to

the benefits of this act and subject to its provisions, *as much as it would have been if it had been included under the act of 1862*, and the fulfillment of the foregoing provisions shall be taken as a compliance with the provision in reference to separate colleges for white and colored students. (Emp. Supp.)

This language is contained with only changes for purposes of codification in 7 U.S.C. § 323. Section 4 of the Second Morrill Act also provided that "the Secretary of the Interior shall ascertain and certify to the Secretary of the Treasury as to each state whether it is entitled to receive its share of the annual appropriation. . . ." The Secretary of Education now has this responsibility. 7 U.S.C. § 326.

7. On or about February 13, 1891, A & M was designated by the Legislature as the Black Land Grant Institution for the State of Alabama.

8. In 1887, Congress had enacted the Hatch Act, 24 Stat. 440 *et seq.*, 7 U.S.C. § 361a *et seq.*, which established agricultural experiment stations at colleges created under the 1862 Morrill Act and provided funds for agricultural research. Even though the Second Morrill Act stated that the 1890 institutions such as A & M would be treated as "if it had been included under the Act of 1862," A & M has never received any funds pursuant to the Hatch Act, for racially discriminatory reasons. The Hatch Act provided the base from which the research component of land grant colleges has grown. Congress has periodically added to that research base and funding with the Adams Act of

1906, 34 Stat. 63-64, 7 U.S.C. § 369 *et seq.*, (which provided funds only for White land grant institutions), the Purnell Act of 1925, 43 Stat. 970, 7 U.S.C. § 370 (which provided funds only for White land grant institutions), the Bankhead Jones Act of 1935, 49 Stat. 436, 7 U.S.C. § 343e, *et seq.*, (which provided funds only for White land grant institutions), and 1946 Public Law 733, 60 Stat. 1083 *et seq.*, 7 U.S.C. § 427 *et seq.* (which provided funds only for White land grant institutions). In summary, all of these Acts establishing and expanding funding for agricultural research have benefited Auburn, but none of them have benefited A & M, for racially discriminatory reasons.

9. In 1914, Congress enacted the Smith-Lever Act, 38 Stat. 372 *et seq.*, 7 U.S.C. § 341 *et seq.*, authorizing the agricultural extension service. The legislative history of this Act plainly indicates racial discrimination. For example, Senator Smith of Georgia, the bill's sponsor, stated as follows:

We will put it in our white agricultural college. We would not appropriate a dollar in Georgia to undertake to do extension work from the Negro agricultural and mechanical school. It would be a waste of money

...

To satisfy Southern Congressmen and Senators such as Senator Smith, a provision was included in the Smith-Lever Act, allowing the States to designate which of the institutions would receive the funds for the extension

service. See 7 U.S.C. § 341. For racially discriminatory reasons, the Governor of the State of Alabama promptly and temporarily designated Auburn as the beneficiary or agency for administering the Smith-Lever Act in Alabama. Thereafter, for racially discriminatory reasons, the Legislature of the State of Alabama recognized Auburn, and not A & M, as the beneficiary of the Smith-Lever Act in the State of Alabama. This recognition has continued until the present with Code of Alabama 1975 § 2-30-1 providing that: "There shall be an Alabama extension service under the charge of and operated in connection with Auburn University. . . ."

10. In each of the three primary areas of the land grant function (agricultural teaching, research, and extension service), both the State of Alabama and the United States of America have discriminated in favor of Auburn, an 1862 Morrill Act Institution, and against A & M, an 1890 Morrill Act Institution, for racially discriminatory reasons. Those discriminatory reasons have also determined the division of funding and responsibility for such related matters as 4-H Clubs, forestry, and home economic services. This discrimination in the land grant function and related matters has continued until the present.

11. In the late 1940s, UA established an extension center in Huntsville, Alabama. At that time A & M had been in existence in or near Huntsville, Alabama for more than 70 years. On or about September 1, 1966, UA's extension center was designated as UAH. In 1969, the UA Board of Trustees approved a separate President for UAH.

12. UAH, as an extension center and as a quasi-separate institution, was established and expanded for racially discriminatory reasons. A & M is and always has been available to accept and teach students of all races. UAH, as an extension center, was established to teach White students. Prior to the summer term, 1962-63, UAH admitted no Black students. So long as it was an extension center, it admitted very few Black students. Both as an extension center and as a quasi-separate institution, it has expanded its academic programs and facilities to attract White students. Today, the percentage of Black students at UAH remains small. The establishment and expansion of UAH has impeded A & M's ability to attract students of all races and has limited the number of total students at A & M. Since there are economies of scale in the operation of a University, this limitation of A & M's students has had an even greater impact on A & M's facilities and programs.

13. The most egregious examples by UAH into academic programs where A & M was previously attracting students of all races is in the programs, both undergraduate and graduate, of education, business, and computer science. UAH duplicated these programs, and then limited A & M's ability to attract students of all races through this duplication. Likewise, there has been similar duplication in other non-engineering programs. This expansion and duplication, and the effects thereof, have continued until the present.

14. For racially discriminatory reasons, until 1975, A & M was governed by the defendant Board rather than enjoying its own Board of Trustees like traditionally White

institutions such as Auburn and UA. At least since Reconstruction, no Black person has ever served on the Board. Calhoun Junior College (hereinafter "Calhoun") was established and expanded under the direction of the Board, and then Athens College (hereinafter "Athens") was taken over and continued under the direction of the Board, despite a contrary recommendation after study by ACHE. Athens and Calhoun have, like UAH, impeded A & M's ability to attract students of all races and have limited the total number of students at A & M. The economies of scale in higher education have caused an even greater impact on A & M's facilities and other resources.

15. For racially discriminatory reasons, A & M lacks much of the authority enjoyed by traditionally White institutions such as UA and Auburn. For example, A & M, unlike UA and Auburn, does not have the right to issue bonds or condemn property. Since A & M cannot issue bonds, it is more limited than Auburn and UA in its ability to finance capital improvements.

FIRST CLAIM

16. Paragraphs 1 through 15 are hereby realleged and incorporated herein.

17. This claim is brought pursuant to Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000d *et seq.*, and is brought against all defendants.

18. Defendants have operated and constituted a racially dual system of public higher education, as described in the First Claim of the original complaint. Defendants have failed to carry out their obligation to achieve a non-

discriminatory, unitary system of higher education. As a result of the ongoing racially dual system of public higher education, A & M has been denied capital and operational funds necessary to carry out its mission in a manner consistent with comparable traditionally White institutions of higher education, especially Auburn. This lack of funding, along with the development and expansion of UAH, and other institutions as previously alleged, have impeded the ability of A & M to attract students of all races. Furthermore, the discrimination against A & M, and in favor of Auburn, in the land grant function and related matters has damaged A & M and has limited its ability to attract students of all races.

19. As alleged in paragraphs 21 and 22 of the complaint, administrative procedures under Title VI were exhausted. Representatives of A & M and other defendants spent literally hundreds of hours in an attempt to achieve a resolution of the matters disputed herein, while this matter was pending before the United States Department of Education. Those efforts were unsuccessful in achieving a state-wide plan to accomplish a racially unitary system of higher education. By the end of 1981, it was futile to proceed any further in the administrative proceeding. After this matter was referred to the Justice Department for litigation, further meetings were held with representatives of all, or almost all, parties to this action, and in those meetings additional attempts were made to achieve a resolution of the matters disputed herein. Those efforts likewise failed, and further efforts were futile.

20. Specifically with regard to the dispute over the land grant function and related matters, while this dis-

pute was in the administrative proceeding, representatives of A & M met with representatives of Auburn in an attempt to achieve a resolution of the land grant issue. No progress was made on that issue, and further efforts to settle the land grant dispute were futile. Nevertheless, after this matter was referred to the Justice Department, an additional meeting was held with representatives of the Justice Department, representatives of A & M, and representatives of Auburn. At that time, representatives of Auburn refused to discuss the vast majority of the disputed matters related to the land grant function. Further attempts at resolving the disputed matters related to the land grant function were clearly futile. Any other administrative attempts by A & M to achieve compliance with Title VI would achieve nothing for A & M. Even if A & M debarred some defendants from the receipt of certain federal funds, this would not achieve what A & M requests here or benefit A & M.

21. Through their agreements under Title VI, and through the application of Title VI, all defendants have waived sovereign immunity.

22. The relief requested in this claim is equitable in nature. The racial discrimination complained of is intentional, continuing in nature and has continued until the present.

23. For the system of public higher education in the State of Alabama to become racially unitary, A & M must have the following relief:

- a) A & M must be enhanced significantly. A & M must receive large amounts of capital funds in order to improve its campus so that it will be

more attractive to students of all races. In addition, A & M must receive large sums of money to enhance its faculty and to offer more incentive to students of all races to come to A & M. This should not be construed as a request for legal damages. Instead, it is equitable relief necessary for the achievement of a racially unitary system of public higher education.

- b) A & M must become an equal partner with Auburn in the land grant function and related matters. This means that A & M must receive equitable land grant funding and equal responsibility with Auburn in agricultural teaching, research and extension services. This further means that in the area of forestry, 4-H Clubs, home economic services and other matters related to the land grant functions, A & M must receive equitable funding and play an equal role with Auburn.
- c) UAH must be enjoined from continuing to offer programs in education, business, computer science, and other non-engineering, non-medically related areas, and from expanding into these and all other programs in such areas. Likewise, other institutions within the immediate area served by A & M must be at least limited in scope. If A & M is to be able to attract students of all races and to become a necessary part of a racially unitary system, while at the same time preserving its tradition and heritage as a traditionally black institution of higher education, then it must be the broad based public university in its immediate area.

WHEREFORE, A & M requests that the Court order defendants to achieve a racially unitary system of higher education, order that the relief stated above be granted to A & M, and grant it such other relief as may be ap-

propriate, including the reimbursement of A & M for the attorney's fees and other costs which it has incurred in the prosecution of these claims.

SECOND CLAIM

24. Paragraphs 1 through 23 are hereby realleged and incorporated herein.

25. A & M is and has been a third party beneficiary of the agreements which all other defendants executed, requiring them to comply with Title VI.

26. The relief requested herein is equitable in nature.

27. Defendants have breached their agreements to comply with Title VI by failing to achieve a unitary system of public higher education, and A & M has been damaged as described.

WHEREFORE, A & M requests that the Court order defendants to achieve a racially unitary system of higher education, order that the relief stated above be granted to A & M, and grant it such other relief as may be appropriate, including the reimbursement of A & M for the attorney's fees and other costs which it has incurred in the prosecution of these claims.

THIRD CLAIM

28. Paragraphs 1 through 23 are hereby realleged and incorporated herein.

29. By accepting federal funds after the effective date of Title VI and not taking steps to achieve a racially unitary system of public higher education, defendants have created a constructive trust, whereby they are obli-

gated to provide A & M, as one of the beneficiaries of that constructive trust, with the relief described above, necessary to achieve a unitary system of public higher education.

30. The relief requested based on this claim is equitable in nature.

WHEREFORE A & M requests that the Court order defendants to achieve a racially unitary system of higher education, order that the relief stated above be granted to A & M, and grant it such other relief as may be appropriate, including the reimbursement of A & M for the attorney's fees and other costs which it has incurred in the prosecution of these claims.

FOURTH CLAIM

31. Paragraphs 1 through 30 are hereby realleged and incorporated herein.

32. The same kind of constructive trust is created pursuant to 42 U.S.C. § 1981 and § 1983 and the Fourteenth Amendment. The discrimination complained of and the effects thereof are continuing in nature and have continued until the present. A & M is requesting only equitable relief in this claim.

WHEREOF, A & M requests that the Court order defendants to achieve a racially unitary system of higher education, order that the relief stated above be granted to A & M, and grant it such other relief as may be appropriate, including the reimbursement of A & M for the attorney's fees and other costs which it has incurred in the prosecution of these claims.

FIFTH CLAIM

33. Paragraphs 1 through 32 are hereby realleged and incorporated herein.

34. The law of the State of Alabama operates to create a constructive trust, as described above. A & M is requesting only equitable relief in this claim.

WHEREFORE, A & M requests that the Court order defendants to achieve a racially unitary system of higher education, order that the relief stated above be granted to A & M, and grant it such other relief as may be appropriate, including the reimbursement of A & M for the attorney's fees and other costs which it has incurred in the prosecution of these claims.

SIXTH CLAIM

35. Paragraphs 1 through 15 are hereby realleged and incorporated herein.

36. This claim is brought pursuant to 42 U.S.C. §§ 1981 and 1983 and the Fourteenth Amendment to the United States Constitution. Pursuant to this claim, A & M requests only prospective equitable relief.

37. Based on intentionally or willful racial discrimination, A & M has been denied an equal role with Auburn in the land grant function and related matters, as described above.

WHEREFORE, A & M requests that defendants be ordered to grant A & M an equal role in the land grant function and related matters and equitable funding to support said role for the future. A & M also requests that it

be awarded such other relief as may be appropriate, including reimbursement for the attorney's fees and costs it has incurred in prosecuting this action.

SEVENTH CLAIM

38. Paragraphs 1 through 15 are hereby realleged and incorporated herein.

39. This claim is brought pursuant to 42 U.S.C. §§ 1981 and 1983 and the Fourteenth Amendment to the United States Constitution. Pursuant to this claim, A & M requests only prospective equitable relief.

40. Due to intentional or willful discrimination, UAH and other institutions of higher education have been established and expanded in the immediate area of A & M. This discrimination and the effects thereof are continuing in nature and have continued until the present. This has damaged A & M and damaged its ability to attract students of all races.

WHEREFORE, A & M requests the Court to order defendants at least to limit the scope of said institutions so as not to infringe upon A & M's ability to attract students of all races. A & M also requests that it be awarded such other relief as may be appropriate, including reimbursement for the attorney's fees and costs it has incurred in prosecuting this action.

EIGHTH CLAIM

41. Paragraphs 1 through 15 are hereby realleged and incorporated herein.

42. The Second Morrill Act required an equitable division of land grant funding if a state chooses to have separate Black and White land grant institutions. There has never been such an equitable distribution of land grant funding in the State of Alabama, and A & M has been damaged severely by this lack of such an equitable distribution.

4.3. Under this claim, A & M is requesting only prospective equitable relief.

WHEREFORE, A & M request the Court to order defendants to equitably divide all future land grant funding between A & M and Auburn. A & M also requests that it be awarded such other relief as may be appropriate, including reimbursement for the attorney's fees and costs it has incurred in prosecuting this action.

NINTH CLAIM

44. Paragraphs 1 through 15 are hereby realleged and incorporated herein.

45. The Second Morrill Act, and particularly its requirement for an equitable division of land grant funding, with which defendants have never complied, establish a constructive trust of which A & M is a beneficiary. Under that constructive trust, the Court should award A & M significant funds, according to proof, as equitable restitution to make up for the many years of discrimination and the many years of denial of equitable land grant funding which A & M has experienced.

WHEREFORE, A & M requests the Court to order defendants to provide such equitable restitution as the

Court deems proper to A & M. A & M also requests that it be awarded such other relief as may be appropriate, including reimbursement for the attorney's fees and costs it has incurred in prosecuting this action.

TENTH CLAIM

46. Paragraphs 1 through 15 are hereby realleged and incorporated herein.

47. The Second Morrill Act places a requirement on officials of the United States of America, initially the Secretary of Interior, and currently the Secretary of Education, to ascertain and certify whether the Second Morrill Act has been complied with. The provision requiring equitable funding has never been complied with, and the provision requiring that institutions such as A & M, created under the Second Morrill Act, be treated as if they were established under the First Morrill Act, like Auburn, has never been complied with.

48. A & M has been damaged by this gross failure by officials of the United States of America to enforce the above described provisions of the Second Morrill Act in that it has lost substantial funding, and continues to lose substantial funding.

WHEREFORE, A & M requests the Court to order the United States of America to pay to A & M the funds which its officials have caused A & M to lose and to require those officials, particularly the Secretary of Education, to enforce the Second Morrill Act. A & M also requests that it be awarded such other relief as may be appropriate.

ELEVENTH CLAIM

49. Paragraphs 1 through 15 are hereby realleged and incorporated herein.

50. This claim is brought against the United States of America as well as against defendants.

51. This claim is brought pursuant to the Fifth Amendment to the United States Constitution as it related to the United States of America and pursuant to the Fourteenth Amendment to the United States Constitution as it relates to defendants.

52. The language of the Second Morrill Act almost precisely states the holding of *Plessy v. Ferguson*, 163 U.S. 537 (1896), which was expressly overruled in *Brown v. Board of Education*, 347 U.S. 483 (1954). Nevertheless, this language authorizing separate but equal treatment of traditionally White and traditionally Black land grant institutions remains a part of the United States Code. 7 U.S.C. § 323.

53. This separate but so called equal treatment is a plain violation of the equal protection clause of the Fourteenth Amendment and the similar requirement of the Fifth Amendment.

54. This separate but so called equal treatment has damaged and continues to damage A & M in the manner previously described.

WHEREFORE, A & M requests the Court to declare the separate but equal provision of the Second Morrill Act unconstitutional and to order that A & M as an 1890 Morrill Act institution be treated exactly the same as Auburn as an 1862 Morrill Act institution.

64A

Respectfully submitted,

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By /s/

JOE R. WHATLEY, JR.

/s/ JOHN C. FALKENBERRY

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing instrument has been served on the following by depositing same in the United States Mail, postage prepaid, on this 13th day of December, 1983:

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Thomas M. Todd, Esquire
Demetrius Newton, Esquire
J. U. Blacksher, Esquire

/s/ Joe R. Whatley, Jr.
Joe R. Whatley, Jr.

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,))	
et al.,)	
)	
Plaintiffs,	)	CIVIL ACTION
	)	NO.
v.	)	CV83-C-1676-S
)	
STATE OF ALABAMA, et al.,)	
Defendants.)	

SUPPLEMENT TO AMENDED CLAIMS

The Board of Trustees for Alabama A & M University hereby supplements its amended claims by correcting paragraph 10 thereof to read as follows:

10. In each of the three primary areas of the land grant function (agricultural teaching, research, and extension service), both the State of Alabama and the United States of America have discriminated in favor of Auburn, an 1862 Morrill Act Institution, and against A & M, an 1890 Morrill Act Institution, for racially discriminatory reasons. Those discriminatory reasons have also determined the division of funding and responsibility for such related matters as 4-H Clubs, forestry, and home economic services. Another area of the land grant function includes engineering and medically related academic programs, which A & M has been deprived of for racially discriminatory reasons. This discrimination in the land grant function and related matters has continued until the present.

66A

Respectfully submitted,

/s/ Joe R. Whatley, Jr.

/s/ John C. Falkenberry

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CERTIFICATE OF SERVICE

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/s/ Joe R. Whatley, Jr.

No. 87-1200

Supreme Court, U.S.
FILED

MAR 21 1988

JOSEPH F. SPANOL, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

BOARD OF TRUSTEES OF ALABAMA STATE UNIVERSITY;
BOARD OF TRUSTEES OF ALABAMA A&M UNIVERSITY;
JOHN KNIGHT, *et al.*; and
NORMALITE ASSOCIATION, *et al.*,
Petitioners

v.

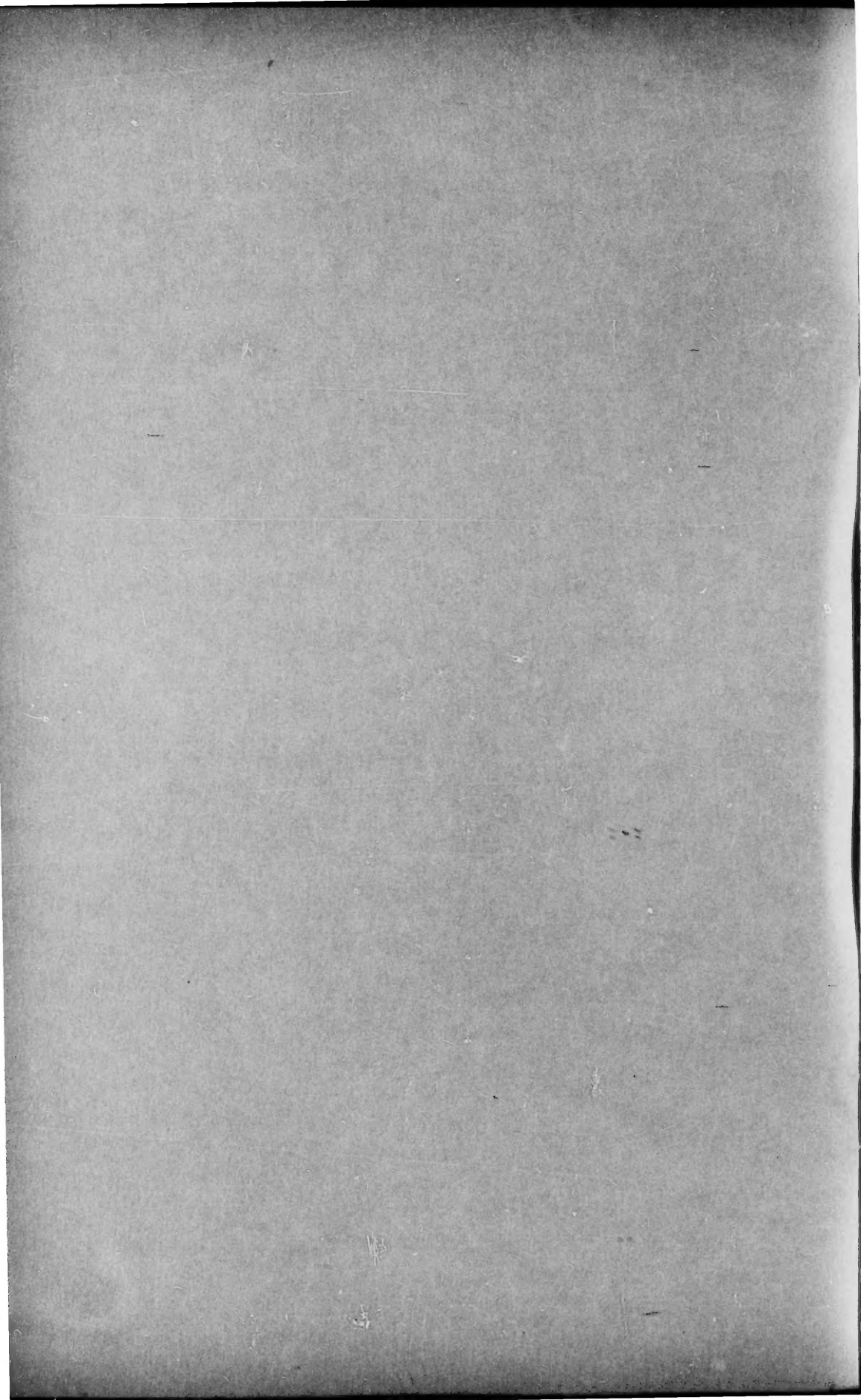
AUBURN UNIVERSITY; BOARD OF TRUSTEES OF THE
UNIVERSITY OF ALABAMA; TROY STATE UNIVERSITY, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

**BRIEF OF RESPONDENT
THE BOARD OF TRUSTEES OF THE
UNIVERSITY OF ALABAMA IN OPPOSITION TO
THE PETITION FOR WRIT OF CERTIORARI**

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QUESTIONS PRESENTED FOR REVIEW

1. Whether two state created universities, as defendants in a suit filed by the United States to eliminate alleged vestiges of a former racially dual system of higher education, have standing to be realigned as plaintiffs and sue the state and its institutions and agencies because their individual board members believe there is a conflict between their oaths of office and prior actions of the state (some of which were committed by the petitioners) that caused the two universities to be in violation of federal constitutional and statutory provisions?

2. Whether, in a suit filed by the United States to eliminate alleged vestiges of a former racially dual system of higher education, this Court should review a decision by the court of appeals that two predominantly black state created institutions of higher education were improperly realigned as plaintiffs because they lack standing to pursue claims against the state and other state universities and agencies?

3. Whether, in a suit by the United States seeking to eliminate alleged vestiges of a former racially dual system of higher education, the court of appeals erred in holding that two state created universities lack standing under 42 U.S.C. § 1983 and the fourteenth amendment to sue for the benefit of their institutions, the state and other state universities and agencies?

4. Does a state created university have standing to sue the state and its institutions and agencies on behalf of the individual members of its board of trustees?

LIST OF PARTIES

Except for the National Alumni Normalite Association (NANA) and the University Legal Defense Fund (ULDF),¹ the parties in this Court are the petitioners² and the respondents, which consist of the United States of America (USA),³ which was an appellee below, and the appellants below, namely: the State of Alabama, the Governor of Alabama, and the Alabama Public School and College Authority (APSCA); the Alabama State Board of Education (ASBE) and its members, who are parties in their official capacities and the Alabama State Superintendent of Education; the Board of Trustees of the University of Alabama (University of Alabama System—UAS) and the members of its Board, who are parties in their official capacities; Auburn University (AU) and the members of its Board, who are parties in their official capacities; and Troy State University (TSU) and the members of its Board, who are parties in their official capacities.

NANA and ULDF sought to intervene in the district court as parties. The district court denied them the right to intervene in the liability phase of the case but permitted them limited prospective intervention “for the purpose of providing the [district court] with their views on any plan of desegregation which may be presented to

¹ NANA and ULDF are two separate support organizations for the Board of Trustees for Alabama Agricultural and Mechanical University (A&M), a public corporation. They are not parties in the court below and cannot be parties in this petition.

² The other petitioners are the Knight Intervenor (*see infra* n.6), the Board of Trustees for Alabama Agricultural and Mechanical University (A&M), and the Board of Trustees for Alabama State University (ASU).

³ The USA filed this action in 1983. It did not join in this petition and has not sought review of the decision of the circuit court below either before that court or in this Court.

the Court” See Memorandum Opinion and Order Granting Limited Intervention (Nov. 28, 1984) reprinted at Appendix 1a-4a. The case has not moved beyond the liability phase. NANA and ULDF did not appeal or otherwise challenge the order of the district court limiting their intervention, and no other order has been entered changing or enlarging their status. They clearly are not parties in this Court or in the circuit court or district court below.⁴ They did not participate in the trial of this case or in any of the several appellate actions, though their names have sometimes been added to joint briefs filed by the other petitioners. Their status is identical to that of the University of Alabama in Huntsville Foundation (UAHF), a support organization for the University of Alabama in Huntsville (UAH), which was granted limited intervention below but was not allowed to participate at the trial. See Memorandum of Opinion Denying UAHF’s Motion to Intervene as of Right and Granting Limited Permissive Intervention (Feb. 25, 1985) reprinted at Appendix 5a-9a.

Two of the petitioners, A&M and ASU, were designated by the court of appeals as non-appealing defendants. They filed separate briefs but were allotted time during oral argument only upon the consent of the two appellees, the USA and the Knight Intervenors. If the petitioners are correct in their assumption that “parties in the district court which were not parties to the appeal in the court below . . . are therefore not understood to be parties in this Court” (Pet. iii), then this Court

⁴ A party which sought but was denied intervention in the court below may seek Supreme Court review of the denial of the motion to intervene but cannot petition for review of any other aspect of the decision. See, e.g., *NAACP v. New York*, 413 U.S. 345, 364-69 (1973); *Cascade Natural Gas Corp. v. El Paso Gas Co.*, 386 U.S. 129 (1967); *United Auto Workers v. Scofield*, 382 U.S. 205, 208-09 (1965).

should consider whether A&M and ASU are parties and petitioners in this Court.⁵

The Knight class⁶ was a plaintiff intervenor in the district court below and an appellee in the circuit court below. The USA was an appellee in the circuit court below but did not join in this petition or separately petition for a writ of certiorari. There are numerous additional parties in the district court which were not parties to the appeal in the circuit court below and thus are not parties in this Court.⁷

⁵ A&M and ASU are the only petitioners seeking to review the court of appeals' decision that they were improperly realigned as plaintiffs. If A&M and ASU have a right to seek a review of their lost status as plaintiffs and the denial of their standing to bring claims, the assessment of the strength of that right should be affected by the fact that they did not challenge in the Eleventh Circuit their redesignation and loss of standing.

⁶ The Knight Intervenors consist of John F. Knight, Katherine Coleman, Charles R. Anderson, Alma S. Freeman, John T. Gibson, Susan Buskey, Carl Petty, Tamara L. Knight, and Dennis Charles Barnett and (a) graduates of ASU, (b) black adult citizens or minor children of the State of Alabama who are presently attending or who are eligible to attend or who will become eligible to attend the public institutions of higher education in the Montgomery, Alabama, area, and (c) black citizens who were, are, or will become eligible to become employed by the public institutions of higher education in the Montgomery, Alabama area, as set out in the "Order of Class Certification" entered by the District Court on January 3, 1985.

⁷ Those parties are: the Alabama Commission on Higher Education (ACHE); Jacksonville State University; the University of South Alabama; Livingston University; the University of Montevallo; the University of North Alabama; NANA and ULDF as limited intervenors; UAHF as a limited intervenor; and Thomas Braswell in his official capacity as comptroller of the State of Alabama and as comptroller of the Alabama Special Education Trust Fund. Athens State College (ASC) and Calhoun State Community College, operated by and under the ASBE, have sometimes been treated as parties.

All senior public institutions of higher education in the State of Alabama (all of which are parties in the district court below), with the exception of Athens State College operated by and under the ASBE, are separate public corporations created by the state legislature.⁸ The corporate names of the UAS, ASU and A&M include the phrase "the Board of Trustees," *e.g.*, the Board of Trustees for Alabama Agricultural and Mechanical University. The petition is sometimes misleading by its failure to distinguish between the corporate names of A&M and ASU and their boards of trustees. The members of the boards of trustees of A&M and ASU are not parties in this action.

⁸ The boards of trustees of the UAS and AU have constitutional authority over the management and control of their institutions.



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IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1200

BOARD OF TRUSTEES OF ALABAMA STATE UNIVERSITY;
BOARD OF TRUSTEES OF ALABAMA A&M UNIVERSITY;
JOHN KNIGHT, *et al.*; and
NORMALITE ASSOCIATION, *et al.*,
Petitioners

v.

AUBURN UNIVERSITY; BOARD OF TRUSTEES OF THE
UNIVERSITY OF ALABAMA; TROY STATE UNIVERSITY, *et al.*,
Respondents

**On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit**

**BRIEF OF RESPONDENT
THE BOARD OF TRUSTEES OF THE
UNIVERSITY OF ALABAMA IN OPPOSITION TO
THE PETITION FOR WRIT OF CERTIORARI**

**CITATIONS TO THE OPINIONS
AND JUDGMENTS BELOW**

The petitioners have correctly described and reprinted in their Appendix the opinions and rulings below which relate to the realignment of A&M and ASU and their

standing to sue the State of Alabama, its officials, agencies, and other public universities.

JURISDICTION

Although the UAS questions the ability of some of the petitioners to join in this petition, it does not dispute the jurisdiction of this Court to act on the petition.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

For the reasons set out in its argument, the UAS does not believe that the issue of the status of A&M and ASU as plaintiffs and their standing to sue the State of Alabama, its officials and agencies, and other public universities, involves either the Supremacy Clause (U.S. Const. art. VI, cl. 2) or the Equal Protection Clause (U.S. Const. amend. XIV, § 1).

STATEMENT OF THE CASE

Following a "compliance review" of Alabama public institutions of higher education in 1978, the Office for Civil Rights (OCR) issued a "Letter of Findings" on January 7, 1981, requesting that the state submit a plan to eliminate alleged vestiges of segregation existing in the state senior institutions of higher education. Unsatisfied with the state's response, the Department of Education referred the matter to the Department of Justice for enforcement under Title VI of the Civil Rights Act of 1964. Acting upon that referral, the Attorney General filed this action on July 11, 1983. The complaint did not allege specific contemporary acts of race discrimination but charged that "vestiges" of a former dual system of higher education remained.

Almost immediately, A&M and ASU separately moved for realignment as plaintiffs or, in the alternative, to file cross claims. A&M asserted Title VI and fourteenth

amendment claims against UAS, AU, and the state. ASU asserted claims on a like basis against AU, TSU, and the state and sought the merger of Auburn University in Montgomery (AUM) and Troy State University in Montgomery (TSUM) under the control of ASU. Both motions were granted by the district court on September 26, 1983. A&M and ASU then filed separate motions for leave to file amended claims which the district court granted. In its amended claims, A&M alleged discriminatory treatment with respect to its land grant function and funding from the state and charged that the development of the University of Alabama in Huntsville (UAH), one of the campuses of the UAS, and other institutions in north Alabama was attributable to racially discriminatory reasons. The relief requested by A&M included the termination of major existing academic programs at UAH, the prohibition of new programs at UAH, and significant monetary and program enhancement of A&M, all so that A&M would become "the broad based public university in its immediate area."

In 1981, almost immediately after OCR issued its Letter of Findings, John F. Knight, Jr., and others described as administrators, faculty, students, and alumni of ASU, filed an action seeking the merger of AUM and TSUM into ASU. *Knight v. James*, United States District Court for the Middle District of Alabama, Civil Action No. 81-52-N. That district court certified a class of plaintiffs consisting of graduates of ASU and black citizens of Alabama who are eligible for employment by or who attend or may attend public institutions of higher education in the Montgomery, Alabama area. After the filing of this suit, the class plaintiffs in *Knight* moved to intervene in this action, which was granted, and the district court below certified the same class in this action. (See *supra* note 6).

The trial began on July 1, 1985, and concluded on August 2, 1985. On December 9, 1985, the district court

entered an order and memorandum of opinion in which it found that a racially dual system of higher education previously had been operated by the State of Alabama which had not been fully eliminated. The district court identified certain vestiges which it found to exist and ordered the state, the governor, ACHE, and APSCA to submit a plan to eliminate those vestiges.

An issue severed from the main case involving the recertification by ASBE of certain teacher education programs at ASU was heard on August 16, 1985, after the trial of the main case. On August 20, 1985, the district court enjoined ASBE from decertifying ASU's education programs. The ASBE appealed the injunction to the Eleventh Circuit, which affirmed the injunction on behalf of the Knight Intervenors and held that ASU had no right to sue the state or its agencies under Title VI, the fourteenth amendment, or 42 U.S.C. § 1983. *United States v. Alabama*, 791 F.2d 1450 (11th Cir. 1986) (Pet. App. 139a-154a). ASU first filed with the court of appeals a petition for rehearing and suggestion for rehearing *en banc*, which were denied, and then petitioned this Court for certiorari, which was also denied. *United States v. Alabama*, 791 F.2d 1450 (11th Cir. 1986), *cert. denied sub nom. Board of Trustees of Alabama State University v. Alabama State Board of Education*, 107 S. Ct. 1287 (1987).

Meanwhile, the district court overruled motions by the UAS and other defendants seeking review of the district court's order under 28 U.S.C. § 1292(b), all of which were denied by the district court. Thereafter, the UAS and other defendants filed notice of appeal under 28 U.S.C. §§ 1291 and 1292(a). On February 7, 1986, AU moved in the district court for a stay of further proceedings, but the court did not act on that motion. On February 13, 1986, UAS and AU filed separate motions for a stay in the Eleventh Circuit, which were granted on February 14, 1986. A&M, ASU, and the Knight Inter-

venors filed separate motions to dissolve the stay, which were overruled by the Eleventh Circuit on March 20, 1986; their accompanying motions to dismiss the appeals were "carried with the case."

On May 16, 1986, the same petitioners in this case petitioned this Court for a writ of certiorari seeking a dissolution of the stays entered by the Eleventh Circuit and a ruling that the appeal from the district court to the court of appeals was premature. While that petition was pending, the petitioners also filed Application No. A-239 with Justice Powell, to dissolve the stay orders issued by the court of appeals. On September 30, 1986, Justice Powell denied the Application, and on October 6, this Court denied the petition for writ of certiorari.

On October 6, 1987, the Eleventh Circuit rendered its opinion reversing the judgment of the district court and remanding the case with instructions that the complaint of the United States and the Title VI claim of the Knight Intervenors be dismissed without prejudice and that the remaining claims be assigned to another judge for a new trial or other proceedings. *United States v. State of Alabama*, 828 F.2d 1532 (11th Cir. 1987) (Pet. App. 1a-40a). Because of its reversal and remand on threshold questions, the court of appeals did not reach the merits of the district court's decision.

Upon remand, the case was reassigned as a result of a random drawing, and Judge Sam C. Pointer, Jr., the judge drawn, entered an order dismissing the complaint of the United States and the individual and class claims of the Knight Intervenors under Title VI without prejudice. That order is reprinted at Appendix 10a-11a. Subsequently, on December 21, 1987, the district court entered an order allowing the United States until February 21, 1988, and the Knight plaintiffs until March 21, 1988, to file any amended complaints. A copy of that order is reprinted at Appendix 12a-13a. The district

court recently extended the times for filing those amended complaints to March 23, 1988, for the United States and April 23, 1988, for the Knight plaintiffs.

REASONS FOR DENYING THE WRIT

This brief addresses the issue raised in the petition of the standing of petitioners A&M and ASU to assert claims in the case below under Title VI of the Civil Rights Act of 1964 and the fourteenth amendment against the State of Alabama and other state agencies and universities.

The sole basis urged by the petitioners for the grant of a writ on this ground is that the decision below conflicts with decisions of this Court and other courts of appeal. That perceived conflict derives from A&M's and ASU's misunderstanding that those cases hold that, because of the Supremacy Clause and the oaths of board members to uphold the United States Constitution, state created institutions and the members of their boards have unlimited rights to sue their creator and other state institutions to comply with constitutional provisions and protect constitutional rights.¹

The petition should be denied for two principal reasons. First, the decision to which this petition is directed in

¹ In their Statement of the Case, A&M and ASU complain that the court of appeals did not address their arguments that they could "raise claims either as representatives of their students and faculty, or in pursuance of the board members' obligation to carry out their own oaths of office to obey the Constitution" (Pet. 12). However because neither the questions submitted by the petitioners for review nor their reasons for granting the writ discuss standing predicated upon a right to pursue claims as representatives of their students and faculty, that argument is not before this Court. It was argued thoroughly in the prior petition by ASU to this Court which was denied. *United States v. Alabama*, 791 F.2d 1450 (11th Cir. 1986), *cert. denied sub nom. Board of Trustees of Ala. State Univ. v. Alabama State Bd. of Educ.*, 107 S. Ct. 1287 (1987).

fact did not address the standing issue—the court of appeals held only that A&M and ASU had been improperly realigned as plaintiffs. Its decision was simply an application of an earlier ruling in *Board of Trustees of Alabama State University v. Alabama State Board of Education*, 791 F.2d 1450 (11th Cir. 1986), *cert. denied*, 107 S. Ct. 1287 (1987) (the 1986 Opinion) in which the standing issue was fully addressed and as to which this Court has already denied a writ of certiorari. Second, the petitioners' assertion that the decision below conflicts with decisions of this Court and of other circuits is wrong and is based upon a misunderstanding of those cases and the holding in this case.

I. The decision under review here addressed the improper realignment of A&M and ASU as plaintiffs, not their standing; A&M and ASU are asking this Court to review an earlier decision (the 1986 Opinion) which it previously has declined to review.

The petition plays a kind of “pea and shell” game with two different decisions below. This Court has previously declined to review the standing issue which is at the base of this petition. ASU unsuccessfully sought review by this Court of the 1986 Opinion written by Judge Frank M. Johnson, Jr., which held that ASU did not have standing under Title VI or the fourteenth amendment to sue the state or other state agencies. (Pet. App. 139a-154a). The present petition is nothing more than an attempt by ASU (joined now by A&M) to take another bite at the same apple.

The subsequent decision, which the present petition challenges, is simply an application of the earlier 1986 Opinion. In fact, the decision before this Court did not address standing *per se*. The court of appeals held only that the realignment of ASU and A&M as plaintiffs was improper. That *per curiam* opinion of Judges Vance and Kravitch of the Eleventh Circuit and Judge John R. Brown of the Fifth Circuit (sitting by designation) (the

1987 *per curiam* Opinion) addresses this issue in a footnote. (Pet. App. 5a, n.1). The decision can hardly be construed to make new law on the issue of standing or to warrant review by this Court under Supreme Court Rule 17.

In a "now you see it and now you don't" argument, the petitioners move back and forth between the 1987 *per curiam* Opinion and the 1986 Opinion as though they were the same, as though the time for seeking review by this Court of the 1986 Opinion had not run, and as though this Court had not previously declined to review that decision.

Clearly it is the 1986 Opinion that the petitioners seek to review. The petitioner asks "[w]hether the court below correctly held that a state university and its board members have no standing" (Pet. ii, Question 5). In their statement of the case, the petitioners assert "[t]he opinion below also held that the two state institutions and their boards of trustees lack standing to assert fourteenth amendment claims." (Pet. 11-12).

Though the 1986 Opinion primarily concerned certain educational courses offered only at ASU, A&M- filed in that appeal an appearance and an extensive brief and submitted post argument material to the court of appeals, all in support of its position favoring standing. The Knight Intervenors also filed an appearance, a brief, and a post argument memorandum.

After the decision, ASU filed a petition for rehearing and suggestion for rehearing *en banc*, both of which were denied.² ASU then filed a petition for a writ of certiorari to this Court challenging that part of the order denying standing to ASU.³ The United States opposed

² *United States v. State of Ala.*, 796 F.2d 1478 (11th Cir. 1986).

³ ASU argued that certiorari should be granted because the court of appeals erred "in holding that [ASU] had no standing to seek

that petition. This Court denied that petition. Unless there is some slight of hand, the pea (i.e., the decision petitioners seek to have reviewed by this Court) has to be either the 1987 *per curiam* Opinion relating to realignment or the 1986 Opinion relating to standing. The petitioners have not addressed the former but have directed their argument against the latter, a decision which this Court declined to review and which is no longer subject to review.

II. Neither the decision under review here nor the 1986 Opinion conflicts with decisions of the Supreme Court or other courts of appeal.

The decision in the 1987 *per curiam* Opinion that the district court improperly realigned A&M and ASU as plaintiffs relies on the 1986 Opinion and, in effect, holds that A&M and ASU lack standing to present fourteenth amendment and Title VI claims against the state universities and institutions under the facts and circumstances in the main case. Review by this Court is not warranted because that result does not conflict with existing decisions of the Supreme Court or other courts of appeal.

The petitioners misinterpret the application by different courts of the same legal principles to different facts as a conflict. Certainly state created public institutions are neither absolutely prohibited in all circumstances from suing their creator or other state institutions nor totally unlimited in their freedom to do so. If there is any conflict among the circuits and between the circuits and the Supreme Court, it is in those circuits which con-

the preliminary injunction" and "in reaching the question of [ASU's] standing once [the court] had found another party who had obtained the same relief and who had unquestioned standing." Petition for Writ of Certiorari (by ASU) at 6 and 11, *Board of Trustees of Ala. State Univ. v. Alabama State Bd. of Educ.* (No. 86-749), *cert. denied*, 107 S. Ct. 1287 (1987).

tinue to adhere to a *per se* rule that creatures of the state never have standing to invoke constitutional provisions in opposition to the will of their creator. *Coleman v. Miller*, 307 U.S. 433 (1939); *Williams v. Mayor of Baltimore*, 289 U.S. 36 (1933); *City of Trenton v. New Jersey*, 262 U.S. 182 (1923); *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907). Compare *City of Safety Harbor v. Birchfield*, 529 F.2d 1251 (5th Cir. 1976) with *Rogers v. Brockette*, 588 F.2d 1057 (5th Cir.), *cert. denied*, 444 U.S. 827 (1979). In spite of the efforts of the petitioners to characterize the standing decision below as an application of the *per se* rule, it is clear the court of appeals did not adopt that approach; the court emphatically stated that "we cannot accept appellant's broad contention that ASU, as a creature of state government, has no federally protected rights whatsoever under the Constitution or laws of the United States." (Pet. App. 142a). The court rejected a *per se* rule absolutely prohibiting a political subdivision from raising constitutional objections against its creator:

Thus, no *per se* rule applies in this Circuit. In assessing the standing to sue of a state entity, we are bound by the Supreme Court's or our own Court's determination of whether any given constitutional provisions or law protects the interests of the body in question. However, if no such determination has been made, it is our task to review *de novo* whether the state entity has any rights under the particular rule invoked. (footnote omitted).

Pet. App. 143a-144a.

Obviously unpersuaded by the arguments of ASU (and of the Knight Intervenors and A&M on its behalf) that ASU had standing to pursue claims on behalf of its students and faculty and that the members of its board had a personal stake in, and were at risk because of, the constitutional duty to desegregate and their obligation to obey the Constitution through their oath of office, the

court returned to the long-standing general rule and cited *Coleman v. Miller*, 307 U.S. at 441, for the proposition that municipal corporations have no standing to invoke the fourteenth amendment of the Constitution in opposition to the will of their creator.⁴ (Pet. App. 144a).

That the court of appeals did not apply a *per se* rule further appears in the explanation it made in distinguishing its ruling from that of *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982): "We are persuaded that *Seattle School District* may be harmonized with the conclusion of this Court that a creature of the state *normally* has no Fourteenth Amendment rights against its creator." (emphasis supplied) (Pet. App. 145a, n.5).

A&M and ASU erroneously read the Supreme Court and circuit cases they cited to hold that a state created institution may sue its creator in all circumstances in which the state institution believes there will be a malfeasance or nonfeasance of constitutional duty by it or the members of its board, unless it can sue.

A&M and ASU claim that the decisions below conflict with two decisions of this Court: *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982) and *Board of Education v. Allen*, 392 U.S. 236 (1968). Petitioners cite *Allen* for the proposition that a school board has "standing to challenge state laws and policies that the board believes will interfere with its duty to support the Constitution." (Pet. 25). First, *Allen* says nothing more than that the individual members of the board of education had a personal stake in the outcome of the litigation because of a conflict between their oath to support the Constitution and their refusal to comply with a state law, an act that would likely bring about their expulsion

⁴ In analyzing the public corporate character of the UAS, the Supreme Court of Alabama has likened it to a municipal corporation, a conclusion that would apply as well to A&M and ASU. *Cox v. Board of Trustees*, 161 Ala. 639, 648, 49 So. 814, 817 (1909).

and a reduction in state funds for their school district.⁵ Though standing had been an issue in the state court proceedings, it was not an issue presented by any of the parties in the Supreme Court. Consequently, care should be exercised in reading too much into and applying too far the short footnote of *Allen*. Second, it should be noted that the "personal stake" found by the Court in *Allen* was obviously addressed to the members of the board of education and not to the entity itself. An entity cannot take an oath of office or be expelled from office. The individual board members of A&M and ASU are not and never have been parties in this lawsuit, either as plaintiffs or defendants. Third, the members of the board in *Allen* were faced with a state statute, imposed after the assumption of their duties, that specifically directed their conduct and the performance of their duties in ways that the state theretofore had not chosen to control. In effect, the state was directing the members of the board to take an action.

This Court has held that a personal stake in the outcome of a controversy is only a constitutional minimum for standing. *Warth v. Seldin*, 422 U.S. 490, 499 (1975). In *City of South Lake Tahoe v. California Tahoe*, 625 F.2d 231 (1980), the Ninth Circuit denied standing to the city on the "well established" principle that "political subdivisions of a state may not challenge the validity of a state statute under the Fourteenth Amendment." 625 F.2d at 233. As to the standing of the individual council members, citing *Warth*; *Schlesinger v. Reservists to Stop the War*, 418 U.S. 208 (1974); *United States v. Richardson*, 418 U.S. 166 (1974); *O'Shea v. Littleton*, 414 U.S. 488 (1974); and *Sierra Club v. Morton*, 405 U.S. 727 (1972), the Ninth Circuit found that the council members had only an "official stake" and not a "personal stake" and that *Allen* was "an abrupt departure

⁵ *Board of Educ. v. Allen*, 392 U.S. 236, 241 n.5 (1968).

from settled precedent" in that it required nothing more for standing than "a forced choice between violation of the oath of office and potential expulsion from office."⁶ *City of South Lake Tahoe*, 625 F.2d at 236-38.

Since the 1986 Opinion expressly does not adopt the *per se* rule discussed in *City of South Lake Tahoe*, the petitioners are wrong to argue that the court of appeals decisions below conflict with *Allen* or, for that matter,

⁶ Both the Ninth Circuit and the petitioners read *Allen* too broadly, though the Ninth Circuit ends with an application of the general rule against state institutions suing their creator which is consistent with *Allen*. Their error is in thinking that *Allen* demands nothing more "than a forced choice" to permit suit. *City of South Lake Tahoe*, 625 F.2d at 227. The difference in the board members in *Allen* (who had standing) and the council members in *City of South Lake Tahoe* (who lacked standing) is that the state statute requiring the purchase and lending of textbooks to parochial schools was directed specifically to the school board as the instrument to carry out the constitutionally suspect activity; the city council members, along with developers, realtors, contractors, owners of property, and the public in general, were all subject to the land use regulations and regional and transportation plans adopted by the political subdivision. The Ninth Circuit found such "official" interest of the council members to be an "abstract constitutional grievance" lacking "the specificity and adversarial coloration that transmute vague notions of constitutional principle into 'a form historically viewed as capable of judicial resolution.'" *Id.* at 328, citing *Schlesinger*, 418 U.S. at 218 which quotes *Flast v. Cohen*, 392 U.S. 83, 101 (1968). The *Allen* court did not say that *any* personal stake in the outcome and *all* beliefs of unconstitutionality, *ipso facto*, provide standing.

In the opinion of Justice White (Justice Marshall joining) dissenting from the denial by the Supreme Court of certiorari in the *City of South Lake Tahoe* case [449 U.S. 1039 (1980)], *Schlesinger* and *Richardson* did not overrule *Allen*, *sub silentio*, a position the Ninth Circuit did not have to reach in order to find that the council members lacked standing. However, Justice White would find in the council members a personal stake rather than a generalized interest of all citizens and would apply the holding of *Allen* to the standing of the city rather than a *per se* rule. *Id.* at 1041-42.

with the interpretation of Justices White and Marshall of the *Allen* and *City of South Lake Tahoe* decisions in their dissent from the denial of certiorari in *City of South Lake Tahoe*. 449 U.S. 1039 (1980). The petitioners may find a conflict between *Allen* on one hand and *City of South Lake Tahoe* and other courts of appeal decisions on the other, but they cannot find one between *Allen* and the court of appeals decisions below.

The only other decision of this Court which A&M and ASU contend conflicts with the decisions below is *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982). The 1986 Opinion distinguishes its holding from *Seattle*.⁷ Without explanation or argument, A&M and ASU simply reject out of hand that explanation.⁸

The standing of the school board was not raised in *Seattle* and is not discussed in the majority or dissenting opinions. The petitioners misread *Seattle*: "[T]he lower court's holding is also contrary to this Court's recent decision in [*Seattle*], which conferred Fourteenth Amendment standing on a local school board" (Pet. 25-26). Even if this Court had made a specific ruling on standing in *Seattle*, the factual and legal circumstances surrounding the Seattle School Board and its claims are significantly distinguishable from those of A&M and ASU. The Seattle School Board was exercising its comprehensive, long-standing control over its transportation

⁷ The 1986 Opinion recognized that *Seattle* does not address the school board's standing but "harmonizes" its conclusions that ASU lacks standing with the school board's right to sue in *Seattle*, recognizing that a creature of the state *normally* has no fourteenth amendment right against its creator but can pursue those rights if the state reorders its political organization (i.e., its educational decision making process) in a way that violates the constitutional guarantee of equal protection. (Pet. App. 145a, n.5).

⁸ "Petitioners believe the [1986 Opinion] analysis offers no basis for distinguishing between the situation of the Seattle school board and the Boards of Trustees of [ASU and ASM]." (Pet. 26).

system in order to facilitate the desegregation of its schools. The school board had the power and authority under state law to transport students, and it was doing so both generally and, in some instances, in a manner to further desegregation. A statewide initiative was drafted and proposed by those opposing the use of mandatory busing for racial integration and the people of Washington adopted it. Thus *Seattle* dealt with a state statute that was directed specifically to school boards, including the Seattle School Board; and it was specifically designed to terminate or thwart an activity the school board had already undertaken in the discharge of its constitutional duties. Because standing was not raised or discussed, one should not draw conclusions, as apparently have A&M and ASU, about the fact that the school board, rather than its individual members, was the suing party. Certainly there is no support at all in *Seattle* for the petitioners' argument that standing is inherent in the oaths of office of the board members.

Finally, the petitioners contend that the decisions below conflict with four decisions in four different circuits.⁹ (Pet. 22-23). There is no conflict between the decisions below and *Baliles*. In *Baliles*, the court "found no vestiges of state-mandated segregation in [the Richmond Public Schools] that are appropriately remediable by the state defendants in a school desegregation suit following a finding of unitary status" and affirmed the district court's refusal to order state funding of remedial and compensatory programs. 829 F.2d at 1314. Since the only other plaintiffs did not appeal the district court decision, if the Fourth Circuit had found that the city

⁹ Fourth Circuit, *School Bd. of Richmond v. Baliles*, 829 F.2d 1308, 1310-11 (4th Cir. 1987); Second Circuit, *Aguayo v. Richardson*, 473 F.2d 1090 (2nd Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974); Sixth Circuit, *Akron Bd. of Educ. v. State Bd. of Educ.*, 490 F.2d 1285 (6th Cir.), *cert. denied*, 412 U.S. 932 (1974); and Eighth Circuit, *Brewer v. Hoxie School Dist. No. 46*, 238 F.2d 91, 99 (8th Cir. 1956).

board had no standing, then it could not have rendered an opinion affirming the district court and disposing of the claims against the state defendants.¹⁰ In fact, the Fourth Circuit was simply reaffirming a prior district ruling of some fifteen years earlier that the school board had derivative standing.¹¹ A&M and ASU have not argued that basis for standing in this petition.¹² Finding no reason to overturn its standing ruling in *Bradley*, the Fourth Circuit confirmed it and speculated about other bases for standing: “[i]t would also appear that the School Board has standing to appeal [on other grounds]” *Baliles*, 829 F.2d at 1311. Of course the most significant differences between the decisions below and *Baliles* lie in the facts of each case, the nature of the state action complained of, and the bases claimed for standing. In *Baliles*, those matters arise out of the circumstances existing at the time of the *Bradley* decision when the district court first recognized the derivative standing of the school board; at that time, the district court found that “both the county and state defendants had committed constitutional violations that contributed to Richmond’s segregated education system, and ordered inter-district consolidation of the Richmond Public Schools and

¹⁰ One can only speculate that the court’s liberal finding of standing was motivated by its desire to lend greater judicial support to the district court decision against the individual plaintiffs and the school board and in favor of the state defendants.

¹¹ *Bradley v. School Bd.*, 338 F. Supp. 67, 229-30 (E.D. Va.), *rev’d on other grounds*, 462 F.2d 1058 (4th Cir. 1972), *aff’d by an equally divided court sub nom. School Bd. v. State Bd. of Educ.*, 412 U.S. 92 (1973).

¹² ASU did argue in its earlier petition to this Court seeking review of the 1986 Opinion that it had derivative standing on behalf of its faculty and students, a position that neither ASU nor A&M had asserted at any time in the case below. ASU could not make that claim because the Knight Intervenors specifically include those groups within their class (see n.6, *supra*), and A&M supported the intervention of the ULDF and NANA, both of which purported to represent the interests of those groups.

the schools in the neighboring counties." *Baliles*, 829 F.2d at 1310.

Aguayo is not in conflict with the decisions below and, in fact, should cause discomfort to the petitioners. In an opinion written by Chief Judge Friendly, the court noted the undisputed holding of the district court that the City of New York had standing to assert statutory claims against *federal defendants* but that under *Williams v. Mayor of Baltimore*, the city had no standing to assert constitutional claims. *Aguayo*, 473 F.2d at 1100. Judge Friendly, citing *Allen*, did recognize the standing of the Commissioner of the Department of Social Services of the City of New York based on a "personal stake in the outcome" because of a conflict between his oath to support the Constitution and his duty under state law to carry out the statutory projects. A&M and ASU sluff over the fact that their individual members are not parties in this action and that individual board members, not the public corporation, take whatever oath of office that may be required. The court also found in *Aguayo* that the city "is not a citizen entitled to privileges and immunities under section 2 of Article IV, or section 1 of the Fourteenth Amendment" and that the City of New York "lacks standing to assert constitutional claims against the State." 473 F.2d at 1100, 1101.

In *Akron*, a divided Sixth Circuit panel held that a local board of education and its superintendent had standing to sue the State Board of Education on behalf of its students to prevent a transfer of a small area in the Akron district to an adjoining suburban district. This case is distinguishable from the decisions below because, like the subsequently decided *Seattle School District* case, white students were being transferred from desegregated schools in Akron to all white suburban schools. *Akron*, 490 F.2d at 1288. Further, the court predicated standing on a derivative basis, finding the small number of students involved "would be much less likely to

come to the attention of said parents or arouse their concern" *Id.* at 1289. Though two of the three judges agreed that the board of education had standing, the concurring and dissenting judges agreed that the board could not bring suit under 42 U.S.C. § 1983. *Akron*, 490 F.2d at 1292 (Judge Pratt concurring) and at 1295 (Judge Weick, dissenting). The 1986 Opinion reached the same conclusion. (Pet. App. 144a-145a).

Finally, the petitioners' reliance on *Brewer* as a conflicting decision is completely inappropriate because that case involved a suit, not against a state or governmental entity, but against private individuals, corporations, and unincorporated associations to prevent them from interfering with the school district's desegregation of schools in the district. The suit was not against the state or any of its institutions or agencies.

III. Neither the decision under review here nor the 1986 Opinion warrants review because they are correct.

Accepting the assertions of A&M and ASU in their petition and without considering the salient factual differences between this case and those cases in which state created entities or their board members (or both) were held to have standing to sue their creator or its agencies, the foregoing discussion demonstrates that there is no conflict between the decisions below and prior decisions of this Court and the other circuits. However, there are matters not set out in the petition which reinforce the conclusion that there are no such conflicts and that the ruling below was correct.

A. The individual members of the boards of A&M and ASU are not parties.

The petitioners erroneously state that the members of their boards are parties and base their argument for a review of the decisions below on that error.¹³ The de-

¹³ "The opinion below also held that the two state institutions and their boards of trustees lack standing" (emphasis sup-

nomination of A&M and ASU in the caption and elsewhere in the petition suggests confusion about the identity of the parties before this Court.¹⁴ A corporate entity cannot take an oath of office and cannot be removed for failure to obey such an oath. Even if the individual members of the boards of A&M and ASU were parties to this action, it is not clear that they are required to take an oath of office.¹⁵ The cases cited by the petitioners in which the individual board members were parties, either alone or with their state entity, are clearly distinguishable from this case in which only the state entity is a party.

Essentially, the issue concerning the oath of office is not whether board members are obligated to support the U.S. Constitution but whether, in determining standing, an oath adds to or raises that obligation to a level above

plied) (Pet. 11-12). "The above cases [the courts of appeal cases argued by the petitioners to be in conflict with the 1986 Opinion] typically involve public officials, like petitioners in this case, who have public duties to perform . . . In this case, for example, the petitioners have personal obligations, which they assume by taking their oaths of office . . ." (Pet. 26).

¹⁴ In the caption and throughout the petition, A&M and ASU are referred to as the "Board of Trustees of [A&M and ASU]." In the state statutes creating these institutions, they are denominated the "board of trustees for [A&M and ASU]." Presumably this difference in preposition is an oversight and not an attempt on the part of the petitioners to recharacterize the parties at this stage.

¹⁵ Both the U.S. Constitution (art. VI) and the Alabama Constitution (art. XVI, § 279) require all state *executive* officers (among others) to take an oath, or to be bound by one, to support the U.S. Constitution. It is not clear that the members of a board of trustees of a separate public corporation created by the State of Alabama to manage and control a university are such executive officers. The Alabama Supreme Court has held that the requirement of an oath extends only to persons vested with the sovereign power of the state, something the board members of A&M and ASU do not exercise. *Burdette v. Coats*, 500 So.2d 1 (Ala. 1986).

that of ordinary citizens ¹⁶ and sufficient to override their duty of loyalty and commitment to the state creator and benefactor.

B. There is no conflict with the petitioners' constitutional duty to desegregate that provides standing for them to sue the state.

A&M and ASU are trying to use the oaths of office of their nonparty board members and the Supremacy Clause as abracadabras to ward off liability and to gain enhanced institutional status and funding. Unlike the Seattle School Board, the petitioners' incantation of constitutional obligations and remote, past state actions are in sharp conflict with their own role in and control over their racial identification. A&M and ASU have less constitutionally noble purposes. When the United States sued A&M, ASU, and the other public senior institutions of education in the State of Alabama alleging, on a system-wide basis, continuing vestiges of a former, racially dual system, to protect against deleterious remedies affecting their institutions, A&M and ASU confessed liability and sought to avoid remedy by transferring responsibility to the state and the other institutional defendants by suing them. A&M and ASU do not claim that they were engaged in specific actions to desegregate which were hindered or thwarted by specific state statutes or actions to that end; rather, they claim that their racial identification and other conditions that they confess violate Title VI and the fourteenth amendment result from past state actions and current failures to remedy them. If true, such "claims" are, at best, only defensive pleadings. If there are systemic vestiges of a former racially dual system within the State of Alabama that constitute violations of Title VI and the fourteenth

¹⁶ See, e.g., *Warth v. Seldin*, 422 U.S. 490 (1975); *Schlesinger v. Reservists to Stop the War*, 418 U.S. 208 (1974); *United States v. Richardson*, 418 U.S. 166 (1974); and *Sierra Club v. Morton*, 405 U.S. 727 (1972).

amendment, A&M and ASU are a part of that violation and are as vulnerable as any other state university to a remedy for the benefit, not of the universities, but of individuals, who are the beneficiaries of those provisions. The district court used A&M's and ASU's confession of liability and their standing and realignment to project, if not dictate, the nature and scope of any remedy affecting them.

If there is a threat to A&M and ASU in the United States' suit, it comes from their own failure to desegregate. In denying standing to the Governor of Mississippi in a suit by him and others challenging the statutory method for selecting members of the Mississippi State Board of Health, the court found that the governor (like the trustees of A&M and ASU) was "in no danger of expulsion from office as a result of any action that he alone believes may have violated his oath." *Finch v. Mississippi State Medical Ass'n*, 585 F.2d 765, 774 (5th Cir. 1978). The court also denied standing on another basis applicable to A&M and ASU:

There is, however, another infirmity in the Governor's standing; he has not chosen to abide by the law he challenges, but to make nominations that disregard its provisions. Having chosen to break its fetters, he can no longer claim that they bind him. Thus, the governor has not been harmed by the law. He has not shown an injury to himself sufficient to warrant invocation of federal jurisdiction in his behalf. (citations omitted).

Id. at 774-75.

C. The efforts of A&M and ASU to sue the state and other state universities and institutions mask their hidden purpose of having the state support their institutions as separate but equal black universities.

A&M and ASU take the remarkable position that the constitutional and statutory violations, which they confess, necessitate a claim for substantial programmatic

and financial enhancement of their institutions so that they shall be equal to UAS and AU, the only two comprehensive and research doctoral granting universities in the state.

The claims of A&M and ASU sound in money damages, although in response to demands for a jury trial by some of the other defendants, A&M and ASU said they were not seeking damages but prospective relief in the form of increased capital and operating funds and new and expanded programs, all for the purpose of attracting white students. A&M and ASU lack either the insight or honesty of Pogo; they either fail or refuse to recognize that they are largely the current and ongoing cause of their condition. The evidence in the district court clearly established that the continuing racial identity of A&M and ASU is largely, if not totally, the product of their own actions.¹⁷

¹⁷ For example, the only evidence uncovered by the investigation of the OCR of practices designed to maintain the racial identity of an institution was found at A&M. OCR's investigating team found that at A&M "only black disadvantaged students are recruited and enrolled on a sustained basis," and the leader of that team said he probably "just sat there stunned" as the President of A&M articulated what was essentially a racially oriented mission for his institution. A&M acknowledged that its recruitment and hiring for faculty and administrative positions were guided by an effort to keep a direct relationship between the racial characteristics of the student body and the faculty and administrative staff. A&M's efforts to preserve its racial identity are even more apparent from its promulgation of an institutional mission statement listing "the education of capable afro-americans" as one of its primary objectives. ASU's record of discriminatory treatment of white faculty is unequivocally established in *Craig v. Alabama State Univ.*, 451 F. Supp. 1207 (M.D. Ala. 1978), *aff'd*, 614 F.2d 1295 (5th Cir.), *cert. denied sub nom. Dutt v. Alabama State Univ.*, 449 U.S. 862 (1980), which was shown to be continuing. *Craig v. Alabama State Univ.*, 804 F.2d 682 (11th Cir. 1986). Under such circumstances, petitioners can hardly lay at the doorstep of the state any blame for their inability to comply with the fourteenth amendment and Title VI. The denial to the petitioners of the right to sue other state

D. The decision below was that A&M and ASU were improperly realigned by the district court, and that is a correct decision.

The 1987 *per curiam* Opinion relied on the 1986 Opinion and held that, because A&M and ASU lacked standing, their realignment by the district court was improper. It is the 1987 *per curiam* Opinion that A&M and ASU are asking this Court to review. It is clearly a correct decision.

The district court bifurcated the trial below into liability and remedy phases. To date, the case has not gone beyond the liability phase. Before the introduction of any evidence, the district court granted the motions of A&M and ASU that they be realigned and allowed them to file claims against the state and the other defendant state universities and institutions.

Certainly predominantly black A&M and ASU constitute an essential part of the equation necessary to find system liability. Neither their institutions nor the role they may have played in maintaining any racial vestiges can be eliminated from the liability or remedy phase of the case. Before the trial, A&M and ASU requested, and the district court effectively granted to them, a virtual immunity to harm or burden in the remedy phase. Neither the fourteenth amendment nor Title VI should be vulnerable to that kind of self-serving manipulation under the guise of realignment and standing.

agencies has absolutely no effect or limitation upon their ability to begin to recognize their obligations with respect to their own faculty and student bodies.

CONCLUSION

For the foregoing reasons, this Court should decline to review the decision of the court of appeals relating to the standing and realignment of A&M and ASU.

Respectfully submitted,

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APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action Number 83-C-1676-S

UNITED STATES OF AMERICA, *et al.*,
Plaintiffs,

vs.

THE STATE OF ALABAMA, *et al.*,
Defendants.

[Filed Nov. 28, 1984]

MEMORANDUM OPINION AND ORDER
GRANTING LIMITED INTERVENTION

Petitioners University Legal Defense Funds ("ULDF") and National Alumni Normalite Association ("NANA") seek intervention in this action so that they may "... give their input in any and all programs which may be devised to comply with the requests of the Complaint, for all such proposals would have a direct bearing on [them]."

ULDF is a non-profit corporation whose mission is, among other things,

"... to secure financial compensation for Alabama A & M as a result of past years of discrimination funding, and to insure that Alabama A & M maintains its identity as a predominantly black institu-

tion, while at the same time making its resources available to all qualified persons without regard to race, color, or creed."

NANA is an organization of alumni of Alabama A & M University, ("A&M") with a mission similar to that of ULDF.

Petitioners are not entitled to intervene as of right, because they have neither established an unconditional statutory right of intervention, nor have they established that any of their legally cognizable rights are inadequately represented by the existing parties.

However, the petitioners' claims include factual and legal questions common to those raised by the plaintiff and the re-aligned plaintiffs. To the extent that those questions relate to alleged statutory and constitutional violations, unrestricted intervention will unduly delay the adjudication of the rights of the original parties, since a trial date has already been set. More importantly, as to these alleged violations, petitioners' interests are co-extensive with those of A&M, a party to this action; and those interests are being adequately protected by A&M.

If the plaintiff and the re-aligned plaintiffs prevail in this action, it appears to the Court, in the exercise of its discretion, that ULDF and NANA should be heard on any proposed plans of desegregation. Accordingly, their intervention in the action should be limited to that of presenting to the Court their views, by testimony or otherwise, on any proposed plan of desegregation which involves A&M, should this case reach that post-trial stage.

It is therefore ORDERED that the University Legal Defense Fund and the National Alumni Normalite Association be granted limited intervention in this cause, for the purpose of providing the Court with their views on any plan of desegregation which may be presented to the

3a

Court in the event that the plaintiffs and the re-aligned plaintiffs prevail at trial.¹

DONE this 28th day of November, 1984.

/s/ U. W. Clemon
U. W. CLEMON
United States District Judge

¹ Counsel for ULDF and NANA need not be served with papers hereinafter to be filed in this case, other than this order, unless and until the Court renders a decision in favor of plaintiff and re-aligned plaintiffs.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action Number 83-C-1676-S

UNITED STATES OF AMERICA, *et al.*,
Plaintiffs,

vs.

STATE OF ALABAMA, *et al.*,
Defendants.

[Filed Feb. 25, 1985]

ORDER

For the reasons stated in the accompanying Memorandum of Opinion, the Petition of the University of Alabama Huntsville Foundation To Intervene As of Right is DENIED; and limited permissive intervention is GRANTED.

DONE this 25th day of February, 1985.

/s/ U. W. Clemon
U. W. CLEMON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action Number 83-C-1676-S

UNITED STATES OF AMERICA, *et al.*,
Plaintiffs,

vs.

STATE OF ALABAMA, *et al.*,
Defendants.

[Filed Feb. 25, 1985]

MEMORANDUM OF
OPINION DENYING UAHF'S MOTION TO
INTERVENE AS OF RIGHT AND GRANTING
LIMITED PERMISSIVE INTERVENTION

On January 9, 1985, petitioner University of Alabama Huntsville Foundation (UAHF) sought leave to intervene as of right in this action. It asserts that it has an interest in the University of Alabama at Huntsville (UAH), a predominantly white institution of higher learning; that the disposition of the action may impair or impede its ability to protect that interest, and that its interests are not adequately represented by existing parties. For the reasons which follow, the Court finds and concludes that the petition is due to be denied.

UAHF is a private, nonprofit corporation. Its origins date back to 1962, when a "Research Sites Foundation, Inc." was incorporated for "[t]he sole purpose of . . .

serv[ing] in any and all possible ways the interest of the University of Alabama Research Institute at Huntsville, Alabama." The predecessor of UAH, the Alabama Research Institute at Huntsville, was established in the same year. In 1964, the corporation assumed its present name. Since 1980, the Board of Directors of UAHF has included the Chancellor of the University of Alabama System, the President of the University of Alabama in Huntsville, and the members of the Board of Trustees of the University of Alabama residing in the Congressional District in which the University of Alabama in Huntsville is located.

Over the years, UAHF has made substantial contributions to UAH, consistent with its mission. It has contributed, or obligated itself to contribute, nearly \$750,000 to UAH. It owns virtually all of the land in Research Park, the center of high tech development in Huntsville; and it is the principal land owning corporation in the area providing reasonably priced commercial sites.

However, despite its money and its mission, UAHF has no legally cognizable property rights in UAH.¹

UAH was admittedly created by the unilateral action of the Board of Trustees of the University of Alabama, a defendant in this action. It is and has always been under the direction and control of that Board of Trustees. UAHF does not decide or dictate the curricula or course or program offerings at UAH; it does not approve its budget; it does not hire or fire its president, faculty, or staff; it does not own the property on which UAH sits; it does nothing more than its articles of incorporation require; it provides *support* for UAH, and that support

¹ The Court recognizes that interests in property are not essential to intervention as of right, *Cascade Nat'l Gas Corp. v. El Paso Nat'l Gas Co.*, 386 U.S. 129 (1967), but "interests in property are the most elementary type of right that Rule 24(a) is designed to protect . . ." *Diaz v. Southern Drilling Corp.*, 427 F.2d 1118, 1124 (5th Cir. 1970).

is substantial. On the other hand, UAH has no control over UAHF. It lacks authority for example, to demand current income or past accumulation of income from UAHF, albeit that such income exists for the benefit of UAH.

UAHF's sole *raison d'être* is to provide funds to benefit UAH. Its interests lie in the continued existence of UAH as an institution. None of the parties, including A & M, have suggested that UAH be dismantled. So long as UAH remains an institution, the disposition of this action will not, as a practical matter, impair or impede UAHF's mission. Contrary to its argument, UAHF will not be bound by a judgment on the liability aspects of this case. It will remain free to continue its vigorous support of UAH.

The law of this circuit is that

Intervention of right must be supported by "direct, substantial, legally protectible interest in the proceeding. *Howse, supra*, 641 F.2d at 302-21, *Piambino v. Bailey*, 610 F.2d 1306, 1321 (5th Cir. 1980); *United States v. Perry County Board of Education*, 567 F.2d 277, 279 (5th Cir. 1978); *Diaz v. Southern Drilling Corp.*, 427 F.2d 1118, 1124 (5th Cir. 1970); see *Donaldson v. United States*, 400 U.S. 517, 531, 91 S.Ct. 534, 542, 27 L.Ed. 2d 580 (1971) ("significantly protectible interest"). *In essence, the intervenor must be at least a real party in interest in the transaction which is the subject of the proceeding. See Piambino, supra*, 610 F.2d at 1321; *United States v. 936.71 Acres of Land*, 418 F.2d 551, 556 (5th Cir. 1969).

Athens Lumber Co., Inc. v. Federal Elections Com'n, 690 F.2d 1364, 1366 (11th Cir. 1982) (emphasis added). In no wise can UAHF be said to be a real party in interest in these proceedings.

UAHF has been aware of the pendency of this action since it was initially filed. At least one of the members of its Board of Directors is already a defendant in this case by virtue of his or her membership on the Board of Trustees of the University of Alabama and residence in the Congressional district in which UAH is located. In November, 1984, realigned plaintiff Alabama A & M University ("A&M"), the century-old predominately black institution of higher learning also located in Huntsville, filed a statement of its position. In that statement, A & M set forth its contentions concerning liability and relief. Alarmed at the relief requested by A & M insofar as the granting of such relief would affect existing and planned programs at UAH, UAHF filed this intervention petition on January 9, 1985. It should have been aware, from the outset of this litigation, that if liability were established, possible relief might affect existing and planned UAH programs and course offerings.

As of the date on which UAHF initially filed its intervention papers, the file in this case consisted of four volumes of pleadings and 85 volumes of discovery. Numerous depositions had been completed; others had been noticed. A pretrial conference had already been held; the principal pretrial conference was only three weeks away.

Counsel for the parties were, at that time, and they remain to this date, consumed in their preparations for trial, for they were informed last fall that the case would be tried not later than the summer of 1985.

Upon consideration of the factors enumerated in *Sallworth v. Monsanto*, 558 F.2d 257 (5th Cir. 1977), the Court finds that the intervention petition is untimely.

On the issues of whether the State of Alabama and its agents, agencies, and institutions have ever operated a dual system of higher education in Huntsville, Alabama; and, if so, whether that system and its vestiges have been eliminated, such interests as UAHF may possess are ade-

quately represented by the Board of Trustees of the University of Alabama. Indeed, those issues are vigorously being litigated by counsel; for the said Board of Trustees, as they properly should be, for the decisions and actions under challenge here are not those of UAHF; rather, they are decisions and actions of the University of Alabama Board of Trustees and the other named defendants.

UAHF is not liable for any of the decisions and actions; its incentive to litigate is not nearly as pressing as that of the Board of Trustees of the University of Alabama.

For all of these reasons, UAHF is not entitled to intervene as of right.

UAHF also seeks permissive intervention. For the reasons set out in the earlier part of this opinion, the Court finds and concludes that unlimited permissive intervention will unduly delay the adjudication of the rights of the original parties to these proceedings. Accordingly, UAHF will be granted a limited intervention—on the same terms and conditions as those previously imposed on putative interventors University Legal Defense Fund and the National Alumni Normalite Association.

By separate order, the petition to intervene as of right will be denied.

DONE this 25th day of February, 1985.

/s/ U. W. Clemon
U. W. CLEMON
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

No. CV 83-P-1676-S

UNITED STATES OF AMERICA, *et al.*,
Plaintiffs,

-vs.-

STATE OF ALABAMA, *et al.*,
Defendants.

ORDER

In accordance with the instructions of the Court of Appeals, it is ORDERED as follows:

1. The complaint of the United States of America is DISMISSED without prejudice.
2. The individual and class claims of the intervenor-plaintiffs, John F. Knight, Jr. et al., under Title VI of the 1964 Civil Rights Act are DISMISSED without prejudice.
3. This case is assigned to the undersigned and shall be hereafter designated as *John F. Knight, Jr., et al. v. State of Alabama et al.*, CV 83-P-1676-S.¹
4. The undersigned knows of no reason why he might be disqualified under 28 U.S.C. § 144 or § 455. Attached to this order is a description of the relationships the undersigned and members of his family have had with any

¹ Acting pursuant to the mandate of the Court of Appeals, the undersigned directed that the case be reassigned as a result of a random drawing by the Clerk from among the eligible, active judges, of this court. The undersigned was selected in that drawing.

of the parties to this litigation. The undersigned does not believe that these relationships constitute a ground for disqualification and is not making this disclosure as part of an inquiry whether the parties desire under 28 U.S.C. § 455(e) to waive a ground for disqualification. The disclosure rather is being made in an abundance of precaution in view of the prior proceedings in this case that resulted in disqualification of the judge to whom the case was initially assigned and in recognition of the possibility that the parties to the litigation may have a different position regarding the significance of such matters than the undersigned. Any party that desires to submit an affidavit under § 144 or a motion under § 455, whether on the basis of these matters or for other reasons, should do so promptly.

5. A status and scheduling conference is set for Monday, December 21, 1987, at 9:00 a.m. The original plaintiff, the United States of America, need not attend the conference if it is not going to file an amended complaint.

6. Counsel are directed to review the service list attached to this order and (a) send a copy of the order to any other counsel who should have received notice and (b) advise the court of any corrections to the service list. A maximum of two attorneys for each party is permitted.

This the 4th day of December, 1987.

/s/ Sam C. Pointer, Jr.
SAM C. POINTER, JR.
United States District Judge

[Attachments Omitted]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

No. CV 83-P-1676-S

JOHN F. KNIGHT, JR., *et al.*,
-vs.- *Plaintiffs,*
STATE OF ALABAMA, *et al.*,
Defendants.

ORDER

As a result of discussions at a status and scheduling conference held this date, at which all parties appeared by counsel, the following orders are entered:

1. The "Motion to Stay Proceedings," filed on December 16, 1987, is DENIED.
2. The "Renewed Motion to Intervene," filed December 16, 1987, by the University Legal Defense Fund and the National Alumni Normalite Association, shall be submitted for decision without oral argument as of January 25, 1988, based on any briefs filed by January 20, 1988. (A copy of this order shall be mailed to Demetrius Newton, in addition to the attorneys on the service list.)
3. Attached is an amended service list indicating the attorneys on whom motions, orders, briefs, etc. shall be served. Counsel for those defendants which have entered into consent judgments with the United States may, but are not required to, attend future conferences and hearings.
4. Any amended complaint on behalf of the United States shall be filed by February 21, 1988. Any amended

complaint on behalf of John F. Knight, Jr., et al., as plaintiffs, shall be filed by March 21, 1988. Any requests to intervene as a plaintiff shall be filed, with a copy of the proposed complaint, by March 21, 1988.

5. The contents of the Memorandum of Opinion previously filed in this case, as reported in 628 F.Supp. 1137, shall—from part I on page 1140 through the first column on page 1170—be treated as if incorporated into a request for admission under FED. R. CIV. P. 36. Each party is directed to file and serve by February 21, 1988, its response to such Rule 36 request, indicating (by deletion or interlineation) the extent to which it contests the matters recited therein. Objections to such matters (whether on the grounds of relevancy, lack of prior personal knowledge, or lack of evidence at the prior trial) shall not be used to avoid indicating whether the party contests the truth of such matters.

This the 21st day of December, 1987.

/s/ Sam C. Pointer, Jr.
SAM C. POINTER, JR.
United States District Judge

[Attachments Omitted]

No. 87-1200

IN THE
Supreme Court Of The United States

October Term, 1987

BOARD OF TRUSTEES OF ALABAMA STATE
UNIVERSITY; BOARD OF TRUSTEES OF ALABAMA
A&M UNIVERSITY; JOHN KNIGHT, *et al.*; and
NORMALITE ASSOCIATION, *et al.*,
Petitioners

v.

AUBURN UNIVERSITY; BOARD OF TRUSTEES FOR
THE UNIVERSITY OF ALABAMA; TROY STATE
UNIVERSITY; ALABAMA STATE BOARD OF
EDUCATION; STATE OF ALABAMA, *et al.*,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

**BRIEF IN OPPOSITION SUBMITTED BY
RESPONDENT, TROY STATE UNIVERSITY**

WILLIAM FRANKLIN MURRAY, JR.*
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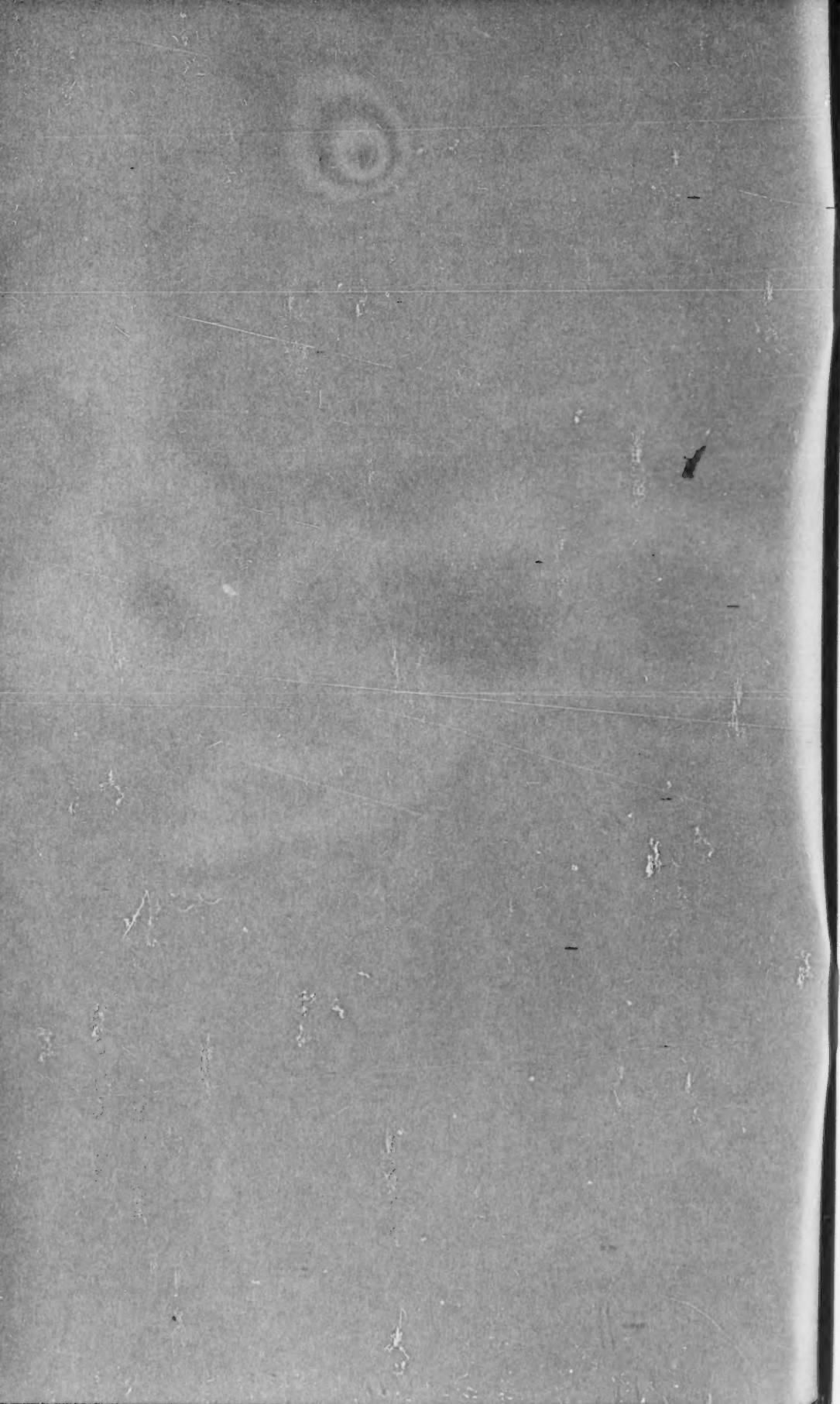
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82122



QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that disqualification of the trial judge was mandated by the fact that, as a private attorney and state senator, the trial judge had participated in and contributed to the events at issue in the litigation and had involved himself in the disputed evidentiary facts involved in the case.

2. Whether the court of appeals correctly held that state universities have no substantive rights and, therefore, no standing to assert claims under the Fourteenth Amendment to the Constitution of the United States or Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.*, against other state universities or state instrumentalities.

The petitioners also seek to raise, "conditionally," the following issue:

3. Whether the court of appeals correctly held that the district court opinion was an appealable final order where, even though the district court had ordered that a remedial plan be submitted for adoption, the opinion determined each issue in detail and left a minimum of flexibility in fashioning a remedial plan.

PARTIES

The petitioners in this Court are shown in the caption. Among the petitioners, only John Knight and the class of individual intervenors were appellees in the court of appeals. Both Alabama State University and Alabama A&M University, petitioners in this Court, were denominated as *amicus curiae* in the court of appeals. The Normalite Association, a petitioner in these proceedings, was allowed limited intervention in the district court and did not participate in the proceedings before the court of appeals. The remaining appellee in the court of appeals, the United States of America, has not sought review of the decision of the court of appeals by petition for a writ of certiorari in this Court.

The respondents in this Court, in addition to Troy State University, are Auburn University, the Board of Trustees for the University of Alabama, the Alabama State Board of Education, the State of Alabama, the Governor of the State of Alabama, the State Superintendent of Education, the Alabama Public School and College Authority, and the Alabama Commission on Higher Education. Each respondent was an appellant in the court of appeals and a defendant in the district court.

In addition, the remaining public institutions of higher education in Alabama were defendants in the district court, but were not parties to the proceedings in the court of appeals and are not respondents in this Court. These public institutions are Jacksonville State University, the University of North Alabama, the University of South Alabama, Livingston University, and the University of Montevallo.

INFORMATION REQUIRED BY RULE 28.1

Troy State University, respondent herein, is a public corporation created pursuant to Alabama Code, 1975, §§ 16-56-1 through 16-56-15. As a public corporation, Troy State University has no subsidiaries and is the subsidiary of no other corporation.

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No. 87-1200

IN THE
Supreme Court Of The United States

October Term, 1987

BOARD OF TRUSTEES OF ALABAMA STATE
UNIVERSITY; BOARD OF TRUSTEES OF ALABAMA
A&M UNIVERSITY; JOHN KNIGHT, *et al.*; and
NORMALITE ASSOCIATION, *et al.*,
Petitioners

v.

AUBURN UNIVERSITY; BOARD OF TRUSTEES FOR
THE UNIVERSITY OF ALABAMA; TROY STATE
UNIVERSITY; ALABAMA STATE BOARD OF
EDUCATION; STATE OF ALABAMA, *et al.*,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

**BRIEF IN OPPOSITION SUBMITTED BY
RESPONDENT, TROY STATE UNIVERSITY**

**CONSTITUTIONAL PROVISIONS AND
STATUTES INVOLVED**

Certain constitutional provisions involved in this case, Article VI, Clause 2 of the Constitution of the United States and Amendment XIV, Section 1 of the Constitution of the United States, and certain statutes involved in this case, 28 U.S.C. § 455, are reprinted in the appendix filed with the Petition for Writ of Certiorari in this case. The following constitutional and statutory provisions are also involved in this case:

Article III, Section 2, Clause 1, Constitution of the United States:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and the Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

42 U.S.C. § 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 2000d:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

28 U.S.C. § 1291:

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam,

and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

STATEMENT OF THE CASE

This action was filed by the United States on July 11, 1983 in the United States District Court for the Northern District of Alabama, naming as defendants the State of Alabama, its Governor, the Superintendent of Education, the State Board of Education, the Alabama Commission on Higher Education, the Alabama Public School and College Authority, and ten public colleges and universities (App. A). The complaint alleged violations of Title VI of the Civil Rights Act of 1964 and the Fourteenth Amendment, specifically that, prior to 1953, the State had established and maintained racial segregation in its public institutions of higher education and that, since 1953, the State had failed to eliminate the vestiges of the dual system by perpetuating discrimination in student enrollment, appointment of boards of trustees, faculty and staff hiring, and allocation of financial and other resources. The complaint further alleged that the proximity of Alabama State University to both Auburn University in Montgomery and Troy State University in Montgomery impeded the ability of Alabama State, an historically black institution, to desegregate.¹ The United States sought development of a remedial plan to eliminate the alleged vestiges of the former dual system. The case was assigned to United States District Judge U. W. Clemon.

Within weeks after the action was filed, both Alabama State and Alabama A&M, named as defendants in the complaint, moved for realignment as plaintiffs and for permission to assert claims against the other public institutions of higher education and state instrumentalities in the case (App. B, C). The claims

¹The complaint also alleged that the proximity of Alabama A&M University to the University of Alabama in Huntsville impeded the ability of Alabama A&M, likewise an historically black institution, to desegregate.

of the realigned plaintiffs, as variously amended, were brought under 42 U.S.C. § 1983 and were predicated on substantive rights under the Fourteenth Amendment and Title VI. Alabama State maintained that the purpose of realignment, in accordance with the resolution of its board of trustees incorporated in its motion seeking realignment, was to preserve "the seniority of Alabama State University as an autonomous, full-service senior institution in the Montgomery area. . . ." (App. B). The relief sought was the merger of both Auburn University in Montgomery and Troy State University in Montgomery into Alabama State or, short of merger, a demand for increased funding and the transfer of programs and other resources from the other proximate public institutions to Alabama State (App. B).²

Immediately following the realignment of Alabama State and Alabama A&M, John F. Knight, Jr., and other individuals described as students, graduates, faculty, and employees of Alabama State, sought intervention as plaintiffs in the action. The Knight plaintiffs asserted claims essentially identical to the claims asserted by Alabama State and sought the same relief — merger of the Montgomery branches of Auburn and Troy State into Alabama State. The district court permitted the Knight plaintiffs to intervene and certified them as representatives of a plaintiff class.³

Shortly before the Knight plaintiffs moved to intervene, Auburn and the State Superintendent of Education each filed similar motions seeking that Judge Clemon be disqualified un-

²Alabama A&M also sought, variously, enhancement of funding and the transfer of programs and functions from other public institutions or state instrumentalities to Alabama A&M.

³The class included graduates of Alabama State, black adults or minor children in Alabama presently attending, or eligible to attend, any public institution of higher education in the Montgomery area, and black citizens who were, are, or will become eligible to be employed by such institutions. The action brought by the Knight plaintiffs had originally been filed in the Middle District of Alabama. Intervention in this action was sought on the basis that the outcome in this case would be determinative of the issues in the suit as originally filed.

der 28 U.S.C. §§ 144 and 145. Judge Clemon denied these motions on several grounds, including the failure to satisfy certain technical requirements of 28 U.S.C. § 144. On petition for mandamus filed by Auburn in the court of appeals, the court determined that the technical requirements had been satisfied by a subsequent filing and directed that another judge be assigned to determine the recusal issue. *In Re Auburn University*, No. 83-7557 (11th Cir. Nov. 10, 1983). After the issue was heard before a Senior District Judge — who ordered that Judge Clemon be disqualified, but then vacated this order and recused himself — the matter was assigned to a Senior Circuit Judge. Following another hearing, the recusal motions were denied and a request by Auburn that the issue be certified for interlocutory appeal likewise was denied.

The case then proceeded in the district court before Judge Clemon. Following extensive discovery and numerous pretrial motions, including motions seeking dismissal of the claims asserted by Alabama State and Alabama A&M on the basis that these state institutions had no standing to proceed against other state institutions, the case was tried for most of the month of July, 1985.

After the conclusion of the trial, but prior to rendition of judgment by the trial court, the State Board of Education determined that certain teacher education programs at Alabama State, both undergraduate and graduate, should not be recertified. The district court, on motion by Alabama State and the Knight class (App. D), entered an injunction prohibiting decertification of these programs pending a decision on the merits in the recently-concluded trial. The State Board of Education perfected an appeal of the injunctive order in the court of appeals, denominated Appeal No. 85-7582.

While Appeal No. 85-7582 remained pending, the district court, on December 9, 1985, entered an order and opinion holding that vestiges of the former dual system remained among the public institutions of higher education and requiring that certain of the defendants formulate remedial plans. *United States v. State of Alabama*, 628 F. Supp. 1137 (N.D. Ala. 1985).

Auburn, Troy State, and the University of Alabama sought review in the court of appeals of this finding of liability, in Appeal No. 86-7090. Following denial of a stay in the district court, motions seeking a stay were filed in the court of appeals, which were granted. Alabama State, Alabama A&M, and the Knight class then sought dissolution of the stays and dismissal of the appeals in the court of appeals. Following denial of these motions in the court of appeals, Alabama State, Alabama A&M, and the Knight class sought to have the stays dissolved and the appeals dismissed by petition for a writ of certiorari in this Court, in Case No. 85-1878. After denial of these petitions, dissolution of the stays and dismissal of the appeals were again sought by application to Justice Powell. This application was likewise denied.

While Appeal No. 86-7090 from the district court order in the principal case remained pending, the court of appeals entered its opinion in Appeal No. 85-7582, the appeal by the State Board of Education of the injunction by which the district court had required the Board to certify the teacher education programs at Alabama State. The court of appeals, while affirming the injunction in favor of the Knight plaintiffs, reversed the injunction in favor of Alabama State on the basis that a state university had no substantive rights and, therefore, no standing to assert claims under the Fourteenth Amendment or Title VI against other state instrumentalities. *United States v. Alabama*, 791 F.2d 1450 (11th Cir. 1986) (App. E). Alabama State unsuccessfully sought review of this decision by petition for a writ of certiorari in this Court, in Case No. 86-749.

On October 6, 1987, the court of appeals entered its decision in Appeal No. 86-7090, reversing the order and opinion of the district court and remanding for a new trial. *United States v. Alabama*, 828 F.2d 1532 (11th Cir. 1987). The court of appeals held, *inter alia*, that the district judge should have been disqualified and, by reference to its holding in the State Board of Education injunctive appeal, that Alabama State and Alabama A&M had no substantive rights and, therefore, no stand-

ing to assert claims under the Fourteenth Amendment or Title VI against other state universities or state instrumentalities. This petition followed.

SUMMARY OF THE ARGUMENT

There is no substantial or direct conflict between the decision of the court of appeals in this case and the decisions either of this Court or other federal courts of appeal, or other special or important reasons, justifying review on certiorari. The trial judge was properly disqualified, in a timely manner, on the basis of his prior participation in events at issue in the litigation and his involvement in the disputed evidentiary facts in this case. The decision of the court of appeals that Alabama State and Alabama A&M, both state instrumentalities, have no substantive rights under the Fourteenth Amendment or Title VI and, therefore, no standing to assert claims against other state instrumentalities, was clearly correct. Decisions which have permitted members of local school boards to sue on behalf of their students or faculty, when board members are faced with a conflict between constitutional duty and state law, have no bearing on this case. The petitioners, moreover, asserted only institutional interests in this litigation, failed to assert *jus tertii* standing in the trial court, and may not raise the issue of *jus tertii* standing for the first time on appeal. Finally, the order of the district court was clearly final and appealable.

ARGUMENT

The petitioners have failed to show that this case involves any "special and important" reasons for the issuance of a writ of certiorari. Sup. Ct. Rule 17. The opinion rendered by the court of appeals is legally sound and is not in conflict with any decision of another federal court of appeals or with any decision of this Court. Sup. Ct. Rule 17. The opinion entered by the court of appeals simply does not present any issues warranting consideration by this Court on certiorari.

I. The Trial Judge Was Properly Disqualified.

The court of appeals correctly held that disqualification of the trial judge was mandated by the fact that, as a private attorney and state senator, the trial judge had participated in and contributed to the events at issue in the litigation and had involved himself in the disputed evidentiary facts involved in the case. The respondent, Troy State University, adopts by reference the argument of the respondent, Auburn University, on the issue of recusal of the district judge.

II. The Court Of Appeals Correctly Determined That Alabama State University And Alabama A&M University Lacked Standing.

- (1) Alabama State and Alabama A&M Have No Substantive Rights and, Therefore, No Standing Under the Fourteenth Amendment or Title VI.

The petitioners seek to have this Court review the determination of the court of appeals that Alabama State and Alabama A&M, as state institutions, have no substantive rights under the Fourteenth Amendment or Title VI which they have standing to assert against other state institutions. *United States v. Alabama*, 828 F.2d 1532 (11th Cir. 1987). This marks the second time that petitioners have sought review on certiorari of this same holding. In an earlier appeal in this same case, *United States v. Alabama*, 791 F.2d 1450 (11th Cir. 1986), *cert. denied*, _____ U.S. _____, 107 S. Ct. 1287, 94 L. Ed.2d 144 (1987), the court of appeals determined that a state institution may not raise a Fourteenth Amendment claim against another state entity under Section 1983 or assert such a claim under Title VI. This holding constituted the law of the case and was extended to the claims of Alabama State and Alabama A&M in the subsequent appeal. 828 F.2d at 1535, n.1. The petitioners seek to have this issue, on which certiorari was previously denied in Case No. 86-749, reviewed once again.

The decision of the court of appeals is entirely consistent with a long line of decisions of this Court, commencing with

Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819), in which it was held that "the framers of the Constitution did not intend to restrain the states in the regulation of their civil institutions, adopted for internal government. . . ." 17 U.S. at 629. From this, there developed a series of decisions holding, generally, that state-created institutions have no standing to invoke substantive rights under certain constitutional provisions in opposition to the state or other state-created agencies or institutions. *Coleman v. Miller*, 307 U.S. 433 (1939); *Williams v. Mayor and City Council of Baltimore*, 289 U.S. 36 (1933); *City of Trenton v. New Jersey*, 262 U.S. 182 (1923); *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907). The reason for this rule is that litigation between state agencies "amounts to a suit by the state against itself," *Rogers v. Brockette*, 588 F.2d 1057, 1065 (5th Cir.), *cert. denied*, 444 U.S. 827 (1979), and an attack upon the "internal organization of the state's political structure," an act constitutionally prohibited. *Dartmouth College*, *supra*. Based on these principles, the courts have generally held that "public entities which are political subdivisions of states do not possess constitutional rights . . . in the same sense as private corporations or individuals. Such entities are creatures of the state, and possess no rights, privileges or immunities independent of those expressly conferred upon them by the state." *Appling County v. Municipal Electric Authority of Georgia*, 621 F.2d 1301, 1307 (5th Cir. 1980); *see also*, *Randolph County v. Alabama Power Company*, 784 F.2d 1067 (11th Cir. 1986); *City of South Lake Tahoe v. California Tahoe Regional Planning Agency*, 625 F.2d 231 (9th Cir. 1980); *City of New York v. Richardson*, 473 F.2d 923 (2nd Cir. 1973); *Triplett v. Tiemann*, 302 F. Supp. 1239 (D.C. Neb. 1969).

In this case, the court of appeals correctly determined that these decisions, rather than creating a *per se* rule that a state entity never has standing to raise constitutional claims, instead are "substantive interpretations of the constitutional provisions involved. . . ." 791 F.2d at 1455, quoting *Rogers v. Brockette*, 588 F.2d 1057, 1068 (5th Cir. 1979), *cert. denied*, 444 U.S. 827

(1979). Clearly, as the court of appeals correctly determined, neither Alabama State nor Alabama A&M, as state institutions, possess substantive rights under the Fourteenth Amendment which they have standing to assert against other state institutions under Section 1983. This Court has repeatedly held that, substantively, state instrumentalities lack standing to assert Fourteenth Amendment rights against the state or other state instrumentalities. *Coleman, supra*, at 441; *Williams, supra*, at 40. As stated in *City of Trenton, supra*, "in none of these cases was any power, right, or property of a city or other political subdivision held to be protected by the Contract Clause or the Fourteenth Amendment. This Court has never held that these subdivisions may invoke such restraints upon the power of the state." 262 U.S. at 188. *Accord, Randolph County, supra*, at 1072; *City of South Lake Tahoe, supra*, at 233; *Richardson, supra*, at 929.

The court of appeals likewise rejected, correctly, the facile suggestion that, because a political subdivision may be a "person" who may be subject to suit under Section 1983, *Monell v. New York City Department of Social Services*, 436 U.S. 658, 690 (1977), political subdivisions should also be considered "persons" for purposes of bringing an action under Section 1983. As stated in *Commonwealth of Pennsylvania v. Porter*, 659 F.2d 306, 327 n.3 (3rd Cir. 1981):

States were never deemed to fall within the class of those for whom Congress created a remedy when it enacted Section 1983. . . . Allowing a state to bring suit, against its own instrumentalities and against its own officers, for their alleged violations, under color of state law, of federal rights belonging to the very state which it is suing, turns the statute on its head.

Virtually every court which has considered this issue, federal or state, has concluded that a state entity is not a "person" which may proceed under Section 1983 against another state actor. *South Macomb Disposal Authority v. Township of Washington*, 790 F.2d 500 (6th Cir. 1986); *Appling County v. Municipal Electric Authority of Georgia*, 621 F.2d 1301 (5th

Cir. 1980); *Buda v. Saxbe*, 406 F. Supp. 399 (E.D. Tenn. 1975); *City of South Portland v. State*, 476 A.2d 690 (Me. 1984).

Moreover, although petitioners have not expressly raised the issue, state entities clearly lack standing to assert substantive rights under Title VI for much the same reasons. Title VI provides, generally, that "no person" in the United States shall be denied the benefits of any federally-assisted program or activity on a racial basis. There is simply nothing in Title VI or its legislative history which suggests that Congress included state instrumentalities among the "persons" with substantive rights under this statute. See also, *Regents of the University of California v. Bakke*, 438 U.S. 265, 287 (1978), where this Court held that Title VI proscribes "only those racial classifications that would violate the Equal Protection Clause. . . ."

The decision of the court of appeals is sound and does not conflict with the decisions of this Court or of other courts of appeal. The result which the petitioners seek would assuredly lead to continuous and expensive litigation among state agencies, overriding legitimate state governmental decisions and conflicting profoundly with our federal system. The result would be government by injunction, a result which the petitioners may find politically desirable, but one which is plainly prohibited by the Constitution.

(2) Alabama State and Alabama A&M Lack Standing to Assert the Rights of Their Students or Faculty.

The petitioners seek to predicate standing to assert claims under Section 1983 and Title VI on a series of decisions, in this Court and in various courts of appeal, which have permitted local school boards to challenge state action by asserting the rights of their students or faculty. See, e.g., *Board of Education v. Allen*, 392 U.S. 236 (1968); *Brewer v. Hoxie School District No. 46*, 238 F.2d 91 (8th Cir. 1956); *Akron Board of Education v. State Board of Education*, 490 F.2d 1285 (6th Cir.), cert. denied, 417 U.S. 932 (1974). Unlike this case, however, the school board members in *Allen*, *Hoxie*, *Akron*, and

similar cases had each been placed in the position of either violating state law or the constitutional rights of their students or faculty. In this case, the members of the boards of trustees of Alabama State and Alabama A&M have not claimed that state actions have placed them in the dilemma of violating either state law or the constitutional rights of their students or faculty. In the absence of a conflict between adherence to state law and constitutional duty, the basis for third party standing to assert the rights of students or faculty is likewise lacking. For this basic reason, as well as other related reasons, the conflict which petitioners purport to find between the decision of the court of appeals in this case, and decisions of this Court or other appeals courts, does not exist.

The decisions of this Court upon which the petitioners principally rely are readily distinguishable from the decision in this case. In *Board of Education v. Allen*, 392 U.S. 236 (1968), although the issue of standing was not expressly raised, this Court stated in dictum that the local school board members could assert First and Fourteenth Amendment challenges to a state statute on the basis of the conflict between their oath to uphold the federal constitution and their duty to comply with state law, a conflict which could result in their expulsion from office should they decline to follow the challenged state statute. No such irreconcilable conflict exists in this case — the Alabama State and Alabama A&M board members have never suggested, nor could they suggest, that they face expulsion from office or any other penalty if they comply with state law.

A second decision upon which petitioners rely, *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), is distinguishable on essentially the same basis. In *Seattle School District*, although the issue of standing was not discussed, the local school board members, placed in a conflict between their duty to uphold the federal constitution and their obligation under a state statute, were permitted to mount a constitutional challenge to the state statute. A conflict of this nature simply does not inhere in this case. Moreover, any suggestion that *Seattle School District* implicitly overruled those decisions of this

Court holding that state institutions, in themselves, have no substantive Fourteenth Amendment rights is plainly untenable. Among the plaintiffs who brought the successful constitutional challenge in the *Seattle School District* case, there were a substantial number of individuals, including minority students later found to be adversely affected by the state initiative measure under attack. *Seattle School District No. 1 v. State*, 473 F. Supp. 996, 999-1000, 1011 (W. D. Wash. 1979), *aff'd in part, rev'd in part*, 633 F.2d 1338 (9th Cir. 1980), *aff'd*, 458 U.S. 457 (1982). In *Seattle School District*, this Court did not consider, and had no reason to consider, its settled line of cases holding that state instrumentalities have no substantive rights under the Fourteenth Amendment which they may assert against other state instrumentalities.⁴

The attempt to find a direct or substantial conflict between the decision in this case and the decisions by other courts of appeal is equally unavailing. In each of the decisions on which the petitioners rely, *Brewer v. Hoxie School District No. 46*, 238 F.2d 91 (8th Cir. 1956); *Aguayo v. Richardson*, 473 F.2d 1090 (2d Cir. 1973); *Akron Board of Education v. State Board of Education*, 490 F.2d 1285 (6th Cir.), *cert. denied*, 417 U.S. 932 (1974); and *School Board of the City of Richmond v. Baliles*, 820 F.2d 1308 (4th Cir. 1987), the local school boards were permitted to assert the rights of their students and faculty on the basis that the school board members had been placed in a position of either violating state law or the constitutional rights of their students or faculty. These conflicting duties, as previously noted, simply do not exist in this case. In both *Baliles* and *Akron*, this conflict placed the board at risk of direct economic injury or individual board members at risk of personal liability, factors which do not, and could not, exist in this case.⁵ Moreover, in *Baliles*, individual plaintiffs with un-

⁴The petitioners also allude to *Papasan v. Allain*, 106 S.Ct. 2932 (1986). In *Papasan*, individual school children were parties and the issue of standing was neither raised nor decided.

⁵The suggestion that the Sixth Circuit decision in *Akron* conflicts with the Eleventh Circuit decision in this case is further undercut by a sub-

questioned standing had been before the trial court. Furthermore, in *Hoxie*, the members of the school board brought the action against individuals and private organizations, not against other state instrumentalities.

These factors readily distinguish this case from the cases in other courts of appeal, and provide no reason to depart from the rule, as stated in *Columbus & G. Ry. Co. v. Miller*, 283 U.S. 96, 100 (1930), that "... the protection of the Fourteenth Amendment against state action is only for the benefit of those who are injured through the invasions of personal or property rights or through the discriminations which the Amendment forbids. The constitutional guaranty does not extend to the mere interest of an official, as such, who has not been deprived of his property without due process of law or denied the equal protection of the laws." There is no substantial or direct conflict between the decision of the court of appeals in this case and the decisions of this Court or other courts of appeal. See, *Singleton v. Wulff*, 428 U.S. 106 (1976); *School District of Kansas City v. State of Missouri*, 460 F. Supp. 421 (W.D. Mo. 1978).

(3) Alabama State and Alabama A&M Are Foreclosed From Asserting the Rights of Their Students or Faculty For the First Time on Appeal.

Even if Alabama State and Alabama A&M could satisfy the conditions for invoking the third party rights of their students or faculty, neither asserted *jus tertii* standing in the trial court and both are, therefore, foreclosed from raising the issue for the first time on appeal. *Bender v. Williamsport Area School District*, 475 U.S. 534 (1986). The pleadings filed by Alabama State and Alabama A&M assert the purely institutional rights of each, and plainly fail to aver any basis for invoking the

sequent Sixth Circuit decision, *South Macomb Disposal Authority v. Township of Washington*, 790 F.2d 500 (6th Cir. 1986), in which that court followed the settled rule in this Court that a political subdivision has no substantive Fourteenth Amendment rights which it has standing to assert against another state instrumentality.

third party rights of students or faculty (App. B, C). For instance, the policy statement of the Alabama State Board of Trustees incorporated in its motion for realignment plainly discloses that Alabama State seeks to pursue purely institutional interests, rather than the third party rights of its students or faculty (App. B). Moreover, the evidence at trial focused entirely on the institutional interests of Alabama State and Alabama A&M. *See, United States v. State of Alabama*, 628 F. Supp. 1137, 1170 (N.D. Ala. 1985). Since standing "must be distinctly and positively averred in the pleadings or should appear affirmatively and with equal distinctness in other parts of the record . . .", *Thomas v. Board of Trustees*, 195 U.S. 207, 210 (1904), both Alabama State and Alabama A&M have clearly failed to preserve this issue for review in this Court. *Warth v. Seldin*, 422 U.S. 490 (1975).

III. The Court Of Appeals Correctly Determined That The District Court Order Was Final And Appealable.

The petitioners seek to preserve for review, "conditionally," the issue of whether the order and opinion entered by the trial court was final and appealable. The petitioners, once again, seek to have this Court review an issue upon which a petition for a writ of certiorari has previously been sought unsuccessfully. This Court denied certiorari on this issue in Case No. 85-1878, after which Justice Powell denied an application on the same issue. Moreover, the decision on the merits that the district court order was final, determining everything except the details of implementation, was clearly correct and does not afford a basis for review on certiorari. *See, Brown Shoe Company, Inc. v. United States*, 370 U.S. 294 (1962); *Morales v. Turman*, 535 F.2d 864 (5th Cir. 1976), *rev'd on other grounds*, 430 U.S. 322 (1977); *Mahaley v. Cuyahoga Metropolitan Housing Authority*, 500 F.2d 1087 (6th Cir. 1974), *cert. denied*, 419 U.S. 1108 (1975); *Thoms v. Heffernan*, 473 F.2d 478 (2d Cir. 1973), *vacated on other grounds*, 418 U.S. 908 (1974).

CONCLUSION

The decision of the court of appeals entered below is not in conflict with any decision of another federal court of appeals or with any decision of this Court, and does not otherwise present any "special and important reason" for the issuance of a writ of certiorari. Accordingly, the petition should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	
)	
THE STATE OF ALABAMA;)	
GEORGE C. WALLACE, Governor)	
of the State of Alabama; THE)	
ALABAMA STATE BOARD OF)	
EDUCATION; WAYNE TEAGUE,)	
State Superintendent of Education;)	
THE BOARD OF TRUSTEES FOR)	
ALABAMA A&M UNIVERSITY, a)	
public corporation; THE BOARD)	
OF TRUSTEES FOR ALABAMA	)	CIVIL ACTION
STATE UNIVERSITY, a public	)	NO. CV-83-C-1676-S
corporation; AUBURN UNIVER-)	
SITY, a public corporation;)	
JACKSONVILLE STATE UNI-)	
VERSITY, a public corporation;)	
LIVINGSTON UNIVERSITY, a)	
public corporation; TROY STATE)	
UNIVERSITY, a public corpora-)	
tion; THE UNIVERSITY OF)	
MONTEVALLO, a public corpora-)	
tion; THE BOARD OF TRUSTEES)	
FOR THE UNIVERSITY OF)	
ALABAMA, a public corporation;)	
THE UNIVERSITY OF NORTH)	
ALABAMA, a public corporation;)	
THE UNIVERSITY OF SOUTH)	
ALABAMA, a public corporation;)	

THE ALABAMA COMMISSION)
ON HIGHER EDUCATION; and)
THE ALABAMA PUBLIC)
SCHOOL AND COLLEGE AU-)
THORITY,)
)
Defendants .)

COMPLAINT

The United States of America, plaintiff, alleges as follows:

1. This action is brought by the Attorney General on behalf of the United States, pursuant to Sections 601 and 602 of the Civil Rights Act of 1962, 42 U.S.C. §§2000d and 2000d-1, and the Fourteenth Amendment to the Constitution of the United States.

2. This court has jurisdiction over this action pursuant to 42 U.S.C. §2000d-1 and 28 U.S.C. §1345.

I. DEFENDANTS

3. The defendant State of Alabama is a State of the United States of America.

4. The defendant Honorable George C. Wallace is Governor and chief executive officer of the State of Alabama. The Governor is ex officio a member of the Alabama State Board of Education, of the Alabama Public School and College Authority, and of the Board of Trustees of each Alabama public institution of higher education. Governor Wallace resides and has his offices in Montgomery, Alabama.

5. The defendant Alabama State Board of Education is an agency of the State of Alabama. Its members are elected by the people. This defendant is responsible for the operation of all public educational institutions in Alabama, except for those institutions which are governed by their own Boards of Trustees. The State Board of Education is now responsible for the operation of Athens State College, an upper-division, two-year institution located in Athens, Alabama. Before

1975, it was responsible for the operation of Alabama A&M University and Alabama State University, and before 1967, it was responsible for the operation of Jacksonville State University, Livingston University, Troy State University, and the University of North Alabama. The State Board of Education meets and has its offices in Montgomery, Alabama.

6. The defendant Wayne Teague is Superintendent of Education for the State of Alabama, and chief executive officer of the State Board of Education. He serves ex officio on the Board of Trustees of each of the institutions set out in paragraphs 9-16, below. This defendant resides and has his offices in Montgomery, Alabama.

7. Defendant Board of Trustees for Alabama A&M University, a public corporation, is an educational institution of the State of Alabama, located in Normal, Alabama.

8. Defendant Board of Trustees for Alabama State University, a public corporation, is an educational institution of the State of Alabama, located in Montgomery, Alabama.

9. Defendant Auburn University, a public corporation, is an educational institution of the State of Alabama. Its main campus is located in Auburn, Alabama, and it maintains a branch campus in Montgomery, Alabama.

10. Defendant Jacksonville State University, a public corporation, is an educational institution of the State of Alabama, located in Jacksonville, Alabama.

11. Defendant Livingston University, a public corporation, is an educational institution of the State of Alabama, located in Livingston, Alabama.

12. Defendant Troy State University, a public corporation, is an educational institution of the State of Alabama. Its main campus is located in Troy, Alabama, and it maintains branch campuses in Montgomery and Dothan, Alabama.

13. Defendant Board of Trustees for the University of Alabama, a public corporation, is an educational institution of the State of Alabama. Its main campus is located in Tuscaloosa, Alabama, and it maintains branch campuses in Birmingham and Huntsville, Alabama.

14. Defendant University of Montevallo, a public corporation, is an educational institution of the State of Alabama,

located in Montevallo, Alabama.

15. Defendant University of North Alabama, a public corporation, is an educational institution of the State of Alabama, located in Florence, Alabama.

16. Defendant University of South Alabama, a public corporation, is an educational institution of the State of Alabama, located in Mobile, Alabama.

17. Defendant Alabama Commission on Higher Education (hereinafter ACHE) is an agency of the State of Alabama. Its members are appointed by the Governor, the Lieutenant Governor, and the Speaker of the House of Representatives. It advises the Governor and the Legislature concerning the allocation of funds to the Alabama institutions of public higher education. All such institutions are prohibited by statute from establishing any new unit or program of instruction before submitting plans for such unit or program to ACHE for review and approval. No funds may be expended to establish any new unit or program which has not received the Approval of ACHE. ACHE has its offices in Montgomery, Alabama.

18. Defendant Alabama Public School and College Authority (hereinafter APSCA) is a public corporation of the State of Alabama, consisting of the Governor, the State Superintendent of Education, and the Director of Finance of Alabama. APSCA has statutory authority to provide for the construction, reconstruction, alteration and improvement of public buildings and other facilities for public educational purposes in Alabama, including the procurement of sites and equipment therefor, and to anticipate by the issuance of its bonds the receipt of revenues appropriated and pledged by the Legislature of Alabama. APSCA has its offices in Montgomery, Alabama.

19. Each of the institutions of higher education named in paragraphs 7-16 of this Complaint, and the Alabama State Board of Education, in consideration for Federal financial assistance, have, by their agents and predecessors, agreed to comply with Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§2000d et seq., and with all requirements imposed by

or pursuant to the regulations of the Department of Education issued pursuant to that Title, 34 C.F.R. Part 100.

20. Title VI of the Civil Rights Act of 1964, and the regulations issued pursuant thereto, provide that no person in the United States shall, on account of race or color, be excluded from participation in, denied the benefits of, or otherwise subjected to discrimination under any program or activity receiving Federal financial assistance from the Department of Education. The regulations provide that all funded programs and activities must be conducted or operated in compliance with all requirements imposed by or pursuant to Title VI. The regulations further provide that upon determination by the Department of Education that a recipient of Federal funds is not in compliance with Title VI or the regulations issued pursuant to Title VI, the United States has the right to seek judicial enforcement of Title VI.

21. On January 7, 1981, an authorized representative of the Department of Education wrote a letter to the Governor of Alabama, informing him that the Department had found that the State of Alabama had violated Title VI by failing to eliminate the vestiges of its dual system of higher education. This letter requested that the State submit a plan for removal of those vestiges, and offered the assistance of the Department of Education in the framing of such a plan.

22. On November 30, 1981, the Governor submitted to the Department of Education a proposed Plan, which, however, was not signed by any party. In compliance with 34 C.F.R. §100.8(d), the responsible officials of the Department reviewed this Plan and determined that it was not adequate. On December 22, 1981, the Assistant Secretary for Civil Rights, Department of Education, advised the Governor that unless an acceptable desegregation plan was submitted within ten days, the matter would be referred to the Department of Justice for enforcement through appropriate judicial proceedings. Subsequently, on January 4, 1982, the Assistant Secretary, having determined that compliance could not be secured by voluntary means, sent a letter to the Assistant Attorney General for Civil Rights pursuant to 34 C.F.R. §§100.8(a) and (d), requesting that appropriate judi-

cial proceedings be brought to enforce the requirements of federal law.

II. FIRST CLAIM

23. Prior to 1953, the defendants and their predecessors, by statute, custom and usage, and pursuant to the authority granted to them by the laws of the State of Alabama, established and maintained a racially dual system of public higher education. Certain institutions in the system were limited to attendance by white students only, and others were limited to attendance by black students only, as follows:

A. The University of Alabama, in Tuscaloosa, Alabama, was established in 1831. Pursuant to the policies and practices of defendants, this institution enrolled only white students. It also enrolled only white students at its extension centers in Birmingham, which opened in 1936, and in Huntsville, which opened in 1950, both of which centers became branch campuses of the University in 1969.

B. Auburn University came under the control of the State of Alabama in 1872. Pursuant to the policies and practices of the defendants, this institution enrolled only white students.

C. The University of Montevallo was established by defendants in 1896, as The Alabama Girls' Industrial School. Enrollment in this institution was limited by statute to "any white girl or woman" Ala. School Code of 1927, §510.

D. Jacksonville State University, Livingston University, Troy State University, and the University of North Alabama were established by defendants as the State Normal Schools at Jacksonville, Livingston, Troy and Florence, respectively. These four institutions were designated by statute as being "for white teachers." Code of Alabama, Title 52, §438 (1950).

E. Alabama State University was established in 1866, as the Lincoln Normal School, and came under the control of the State of Alabama in 1874. It was subsequently known as the Normal School for Colored Teachers, Alabama School Code, §480 (1927), and as Alabama State College for Negroes, Code of Alabama, Title 52, §438 (1950).

F. Alabama A&M University was created in 1873 as the

Colored Normal School of Huntsville. In or about 1891, this institution was moved to its present location, and its name changed to the State Agricultural and Mechanical School for Negroes.

24. Pursuant to the statutes, customs and usages of the State of Alabama requiring segregation of the black and white races, the defendants employed only white persons as administrators, faculty and staff for those of the above institutions which enrolled only white students, and employed chiefly black persons as administrators, faculty and staff for those of the above institutions which enrolled only black students. In addition, the defendants, on the basis of race, discriminated against the institutions established for black students, *inter alia*, in the financial and other resources allocated to them and in the number and quality of educational programs provided. Defendants thereby denied black citizens educational opportunities equal to those provided by them to white citizens.

25. Since 1953, the defendants, by their policies and practices, have maintained and perpetuated the dual system of public higher education based on race, among other ways, as follows:

A. Defendants have denied qualified black applicants admission to traditionally white institutions because of their race. None of the institutions established or operated for white students as described in paragraph 23, above, ever admitted black students before 1963, with one exception: Autherine Lucy was admitted to the University of Alabama, pursuant to an order of this Court, in 1955, but was expelled shortly thereafter by the Board of Trustees, and not permitted to reenroll. Those institutions which accepted black students in 1963 did so pursuant to Court order.

B. Defendants have discriminatorily denied black persons positions on the governing boards of traditionally white institutions, and have continued to employ chiefly white persons as faculty and staff members at those institutions formerly restricted to whites, and chiefly black persons at those institutions formerly restricted to blacks. These practices have had the effect of maintaining the racial identifica-

tion of the institutions, and impeding their desegregation.

C. Defendants have provided black students with fewer opportunities than white students for public higher education, and denied them access to opportunities available to whites.

D. Defendants have failed to take affirmative steps to remove the vestiges of the dual educational system resulting from their policy of racial segregation in education.

26. As one result of defendants' racially discriminatory practices and policies of admission, faculty hiring and assignment, and provision of facilities, resources, and curricular and extra-curricular programs and activities, the institutions of the Alabama system of public higher education remain largely segregated by race, as shown by the statistics set out in Attachments A-D to this Complaint.

III. SECOND CLAIM

27. The United States repeats and realleges each of the allegations contained in paragraphs 1-25 of this Complaint.

28. Because enrollment in Alabama A&M University was restricted to blacks under the State's policy of racial segregation in higher education, a perceived need for educational opportunities for whites in the Huntsville area could not be met by that institution. The University of Alabama undertook to meet that need by offering an extension program in Huntsville, which program eventually, in 1969, became the University of Alabama at Huntsville (UAH). UAH was then, and remains, an identifiably white institution.

29. By creating a racially dual system of public higher education in the Huntsville area, defendants have impeded the desegregation of Alabama A&M.

30. By choosing to maintain racial segregation by establishing a competing institution, defendants have deprived past and present students at Alabama A&M of equal educational opportunities, on the basis of race.

31. Both Auburn University and Alabama A&M University operate programs in agricultural education and research.

32. The defendants have historically appropriated, and continue to appropriate, far greater resources to Auburn than to Alabama A&M for the support of the above-mentioned programs, because of the racial character of these institutions.

33. Various Federal statutes appropriating funds for the support of agricultural education and research programs, including among others, the Second Morrill Act, 26 Stat. 417 (Aug. 30, 1880), 7 U.S.C. §321 *et seq.*; and the Hatch Act of 1887, 24 Stat. 440 (Mar. 2, 1887), vested in the Legislature and Governor of Alabama the power to allocate these appropriations as between Auburn and Alabama A&M. These defendants have historically exercised that power to the advantage of Auburn and the disadvantage of Alabama A&M, because of the racial character of those institutions.

34. The actions of defendants set out in the foregoing paragraphs have been taken on account of the racial character of the institutions concerned, and have deprived past and present students at Alabama A&M of equal educational opportunities on account of race.

IV. RELIEF

35. Defendants have failed and refused to submit a constitutionally acceptable plan to disestablish the racially dual system of public higher education in Alabama, described in the foregoing claims, and have failed to provide specific measures to eliminate the vestiges of the dual system, including the continuing effects of their past and present discriminatory actions, as set out above.

36. The acts and practices of the defendants and their agents maintain and perpetuate an unlawful dual system of higher education based on race, and thereby deprive black students who now attend, and prospective black students who may attend, public institutions of higher education of equal protection of the laws and equal educational opportunities, in violation of the Fourteenth Amendment to the Constitution of the United States, and of Title VI of the Civil Rights Act of 1964 and the regulations issued pursuant

thereto. Unless enjoined by this Court, defendants will continue to deprive such black students and prospective students of the rights guaranteed them by these provisions.

WHEREFORE, the United States prays that this Court enter an order enjoining the defendants, their agents, officers, employees, successors and all persons in active concert or participation with them, from maintaining and perpetuating racial dualism in the State-supported system of higher education in Alabama. The United States prays that defendants be required to develop, submit and implement detailed plans which promise realistically and promptly to eliminate all vestiges of a dual system of higher education within the State, pursuant to the requirements of Title VI of the Civil Rights Act of 1964 and in compliance with the Fourteenth Amendment to the United States Constitution.

The United States further prays that this Court grant such additional relief as the needs of justice may require, including the costs and disbursements of this action.

WILLIAM FRENCH SMITH
Attorney General

/s/ Wm. Bradford Reynolds

WM. BRADFORD REYNOLDS
Assistant Attorney General

/s/ Frank W. Donaldson

FRANK W. DONALDSON
United States Attorney

/s/ Thomas M. Keeling

THOMAS M. KEELING
HARVEY L. HANDLEY, III
JAY P. HEUBERT
General Litigation Section
Civil Rights Division
Department of Justice
Washington, D.C. 20530

ATTACHMENT A

FULL-TIME UNDERGRADUATE ENROLLMENT
Fall, 1980

Institution	Black		White		Total
	#	%	#	%	#
Athens State	45	9.2	436	88.8	491
Auburn - Main Campus	318	2.1	14717	96.9	15195
Auburn - Montgomery	541	15.7	2881	83.4	3453
Jacksonville State	694	15.0	3864	83.3	4636
Livingston	223	27.9	545	68.3	798
Troy State - Main Campus	578	14.5	3348	84.0	3988
Troy State - Dothan	27	10.2	232	87.2	266
Troy State - Montgomery	212	40.8	293	56.3	520
U. of Alabama - Main Campus	1630	12.2	11450	85.8	13342
U. of Alabama - Birmingham	1542	24.9	4493	72.5	6193
U. of Alabama - Huntsville	119	4.7	2354	92.0	2559
U. of Montevallo	138	6.7	1878	91.6	2051
U. of North Alabama	326	8.0	3720	91.5	4065
U. of South Alabama	514	9.8	4433	84.9	5219
TOTALS, TWI'S	6907	11.0	54644	87.0	62776
Alabama A&M	2620	76.3	131	3.8	3433
Alabama State	3355	99.5	2	0.1	3372
TOTALS, TBI'S	5975	87.8	133	2.0	6805
GRAND TOTALS	12882	18.5	54777	78.7	69581

Source: National Center for Education Statistics ("NCES"),
Higher Education General Information Survey ("HEGIS")

ATTACHMENT B**FULL-TIME GRADUATE ENROLLMENT**
Fall, 1980

Institution	Black		White		Total
	#	%	#	%	#
Auburn - Main Campus	38	5.5	569	80.0	711
Auburn - Montgomery	58	13.6	361	84.5	427
Jacksonville State	12	12.0	77	77.0	100
Livingston	12	32.4	20	54.1	37
Troy State - Main Campus	54	15.1	291	81.5	357
Troy State - Dothan	10	5.0	188	94.5	199
Troy State - Montgomery	72	25.9	197	70.9	278
U. of Alabama - Main Campus	82	7.3	939	83.2	1129
U. of Alabama - Birmingham	143	11.8	987	81.2	1216
U. of Alabama - Huntsville	6	2.5	203	84.9	239
U. of Montevallo	3	12.5	21	87.5	24
U. of North Alabama	2	10.5	16	84.2	19
U. of South Alabama	17	5.0	299	88.5	338
TOTALS, TWFS	510	10.1	4168	82.1	5074
Alabama A&M	93	28.2	76	23.0	330
Alabama State	192	96.5	4	2.0	199
TOTALS, TBI'S	285	53.9	80	15.1	529
GRAND TOTALS	795	14.2	4248	75.8	5603

Source: Same as Attachment A

ATTACHMENT C**FULL-TIME PROFESSIONAL ENROLLMENT**
Fall, 1980

Institution	Black		White		Total
	#	%	#	%	#
Auburn - Main Campus	0	0.0	456	99.3	459
U. of Alabama - Main Campus	14	2.5	546	97.5	560
U. of Alabama - Birmingham	62	5.8	991	92.8	1068
U. of Alabama - Huntsville	3	3.5	82	95.3	86
U. of South Alabama	0	0.0	272	100	272
TOTALs	79	3.2	2347	96.0	2445

SOURCE: HEGIS data.

ATTACHMENT D

FULL-TIME FACULTY
Fall, 1979

Institution	Black		Non-Black		Total
	#	%	#	%	#
Athens State	3	7.5	37	92.5	40
Auburn - Main Campus	7	0.7	991	99.3	998
Auburn - Montgomery	7	5.1	129	94.9	136
Jacksonville State	5	1.9	257	98.1	262
Livingston	1	1.6	61	98.4	62
Troy State - Main Campus	6	2.9	204	97.1	210
Troy State - Dothan	*	*	(44)	*	*
Troy State - Montgomery	1	2.9	34	97.1	35
U. of Alabama - Main Campus	20	2.4	796	97.6	816
U. of Alabama - Birmingham	35	2.9	1164	97.1	1199
U. of Alabama - Huntsville	2	1.2	162	98.8	164
U. of Montevallo	0	0	146	100	146
U. of North Alabama	3	1.5	193	98.5	196
U. of South Alabama	18	4.1	426	95.9	444
TOTALS, TWI'S	108	2.3	4600	97.7	4708
Alabama A&M	166	66.4	84	33.6	250
Alabama State	120	69.0	54	31.0	174
TOTALS, TBI'S	286	67.4	138	32.6	424
GRAND TOTALs	394	7.7	4738	92.3	5132

Source: EEO-6 Reports for academic year 1979-80

*Not available

**Not included in totals

APPENDIX B
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
	)	CASE NO.
vs.	)	CV-83-C-1676-S
)	
THE STATE OF ALABAMA,)	
et al.,)	
)	
Defendants.)	
)	

MOTION OF DEFENDANT BOARD OF TRUSTEES
FOR ALABAMA STATE UNIVERSITY FOR
REALIGNMENT AS PARTY-PLAINTIFF

The Board of Trustees for Alabama State University (hereinafter called "ASU") hereby moves to be realigned and treated as a party-plaintiff in this case. In support of this motion defendant ASU represents and shows unto the Court the following:

1. Complaint in this case alleges, *inter alia*, that since 1953 the defendants, by their policies and practices, have maintained and perpetuated a dual system of public higher education based on race, and have failed to take affirmative steps to remove the vestiges of the dual educational system resulting from their policy of racial segregation in education.

2. The defendant ASU, recognizing the continued existence of a racially dual system of higher education in the Montgomery geographical area, proposed, through the administrative officers of Alabama State University, in January, 1980, the merger of Auburn University at Montgomery (hereinafter "AUM") and Troy State University at Montgomery (hereinafter "TSUM") into Alabama State University under the control and governance of the Board of Trustees for Alabama State University and with the name Alabama State University.

3. By resolution adopted January 15, 1981, the defendant ASU reaffirmed merger of AUM and TSUM into Alabama State University as the most equitable and effective method to disestablish the racially dual system of higher education in Montgomery. (A copy of the resolution is attached hereto as Exhibit I, incorporated herein by reference, and made a part hereof as if herein set forth in full.)

4. Defendant ASU has thus asserted, and is asserting a right to relief similar to that sought by plaintiff.

5. Defendant ASU, through the Administrative officers of Alabama State University, has exerted every effort available to it to completely desegregate the faculty, staff and student body of Alabama State University.

6. Questions of law and fact common to defendant ASU and plaintiff will arise in this action.

7. Defendant ASU has an interest in the subject of this action in obtaining essentially the same relief demanded by plaintiff.

8. No party's rights will be adversely affected by realignment as the interest of defendant ASU coincides with that of plaintiff.

9. The interests of the co-defendants are antagonistic to the interests of the defendant ASU.

WHEREFORE, defendant ASU respectfully prays that this court take cognizance of this Motion, and after careful consideration of the matters and things set forth herein, enter an Order, pursuant to and in accordance with Federal

Rules of Civil Procedure, Rules 20 and 21, realigning defendant ASU as party-plaintiff in this action.

Respectfully submitted,
GRAY, SEAY & LANGFORD

By: /s/ Solomon S. Seay, Jr.

Solomon S. Seay, Jr.
352 Dexter Avenue
Montgomery, Alabama 36104
(205) 269-2563

Attorney for Board of Trustees for
Alabama State University

CERTIFICATE OF SERVICE

I hereby certify that I have served copies of the foregoing MOTION OF DEFENDANT BOARD OF TRUSTEES FOR ALABAMA STATE UNIVERSITY FOR REALIGNMENT AS PARTY-PLAINTIFF upon the following persons by placing copies of same in the United States Mail, first-class postage prepaid, on this the 3rd day of August, 1983:

Ira Dement
Dement & Wise
P. O. Box 4163
Montgomery, Alabama
36101

FOR: George C. Wallace
The Alabama
Commission on
Higher Education
The State of Alabama
The Alabama Public
School and College
Authority

Glenn Powell
P. O. Box 295
Tuscaloosa, Alabama 35401
and
Paul Skidmore
P. O. Box 6233
University, Alabama 35486

FOR: The University of
Alabama

Charles Coody
Assistant Attorney General
Department of Education
State of Alabama
Montgomery, Alabama
36130

FOR: Wayne Teague
Alabama State Board
of Education

Thomas Thagard
P. O. Box 78
Montgomery, Alabama
36101

FOR: Auburn University

and
Edward Allen
Balch, Bingham, Baker,
Ward, Smith, Bowman &
Thagard
P. O. Box 306
Birmingham, Alabama
35201

Walter Merrill
500 First National Bank
Building
Anniston, Alabama 36201

FOR: Jacksonville State
University

J. Frederic Ingram
William F. Murray, Jr.
Thomas, Taliaferro,
Forman, Burr & Murray
1600 Bank for Savings Bldg.
Birmingham, Alabama
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FOR: Livingston University

Joe R. Whatley, Jr.
Donald W. Stewart
Stewart, Falkenberry &
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FOR: Alabama A&M
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Richard F. Calhoun
P. O. Box 965
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FOR: Troy State University

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FOR: The University of
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FOR: The University of
North Alabama

Maxey Roberts
The University of South
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FOR: The University of
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35203

Thomas M. Keeling
Harvey L. Handley, III
Jay P. Heubert
General Litigation Services
Civil Rights Division
Department of Justice
Washington, D.C. 20530

/s/ Solomon S. Seay, Jr.

EXHIBIT I

POLICY ON UNIVERSITY DESEGREGATION

WHEREAS, the U. S. Department of Education, Office of Civil Rights, has notified Governor Fob James that the State of Alabama has failed to eliminate vestiges of the former *de jure* racially dual system of higher education; and

WHEREAS, the State is given a limited time in which to submit to the Department a statewide desegregation plan; and

WHEREAS, any such plan would involve Alabama State University.

BE IT THEREFORE RESOLVED, That the Board of Trustees for Alabama State University reaffirms the position that the seniority of Alabama State University as an autonomous, full-service senior institution in the Montgomery area be recognized in any future desegregation plan as is now provided under the statutes of Alabama (H.B. 494, Act 79-461).

BE IT ALSO RESOLVED, That the Board focuses attention on its status as the only Montgomery-based university governance body established under Alabama statutes and calls upon the Legislature and the Governor for such additional powers and duties as would be necessary for management and control of all higher education offerings in the event of change in the governance of the Montgomery branches of Auburn University and Troy State to accommodate any plan for further desegregation, academic or economic improvement.

BE IT FURTHER RESOLVED, That in event of consolidation or merger and/or any change of identity involving Alabama State and the Montgomery branches of Auburn University and Troy State, the Board hereby calls upon the Legislature and Governor to safeguard and preserve the name "ALABAMA STATE UNIVERSITY."

APPENDIX C

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.	)	CASE NO.
	)	CV-83-C-1676-S
THE STATE OF ALABAMA,)	
et al.,)	
)	
Defendants.)	

**MOTION TO REALIGN OR IN THE ALTERNATIVE
FOR LEAVE TO FILE CROSS CLAIMS**

The Board of Trustees for Alabama A & M University (hereinafter "Alabama A & M") hereby moves to be realigned and treated as a party-plaintiff based on the following:

1. The racially dual system of public higher education described in the First Claim in the Complaint has discriminated against and damaged Alabama A & M, a traditionally black institution of higher education, in that, among other things, it has been denied its fair share of the capital and operation funds necessary for it to carry out its mission in a manner consistent with comparable traditionally white institutions of higher education. To correct this discrimination, the Court should require the expenditure of substantial, supplemental funds, according to proof of need and amount, to enhance Alabama A & M so that it can attract more students of all races.

2. Likewise, the allegations of the Second Claim demonstrate discrimination against and damage to Alabama A & M. The University of Alabama in Huntsville (hereinafter "UAH") was established and expanded for racially discriminatory reasons. Especially, the expansion of UAH into

education, business, computer science, and other non-engineering programs has damaged Alabama A & M and limited the ability of Alabama A & M to attract students of all races. At least, UAH should be enjoined from continuing to offer programs in education, business, computer science, and other non-engineering areas, and from expanding into any and all other programs. Also, for racially discriminatory reasons, Auburn has been treated more favorably than Alabama A & M in all land grant functions, including but not limited to agricultural teaching and research and farm extension services. To correct this racially discriminatory treatment, the Court should order that Alabama A & M be given control of all land grant functions in North Alabama, while leaving Auburn with those functions in South Alabama. An equalization of land grant funding is necessary to effect this proper distribution of land grant functions.

3. The claims of Alabama A & M are brought under 42 U.S.C. § 1981 and 1983 and the Fourteenth Amendment to the United States Constitution with subject matter jurisdiction under U.S.C. § 1343, in addition to being under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.* In addition to the relief requested herein and the original Complaint, Alabama A & M requests the award of attorney's fees and such other relief as may be appropriate.

4. Alternatively, Alabama A & M moves for leave to file the cross claims attached hereto.

Respectfully submitted,

STEWART, FALKENBERRY &
WHATLEY

Suite 305, 2100 16th Avenue South
Birmingham, AL 35205
(205) 933-0300

By /s/ Joe R. Whatley, Jr.

Joe R. Whatley, Jr.

/s/ Donald W. Stewart

Donald W. Stewart

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing motion has been served on the following by depositing same in the U. S. Mail, postage prepaid, on this the 25 day of July, 1983:

Ira Dement, Esquire
Dement & Wise
P. O. Box 4163
Montgomery, AL 36101

FOR: George C. Wallace
The Alabama
Commission on
Higher Education
The State of Alabama
The Alabama Public
School and College
Authority

Glenn Powell, Esquire
P. O. Box 295
Tuscaloosa, AL 35401

FOR: The University of
Alabama

Charles Coody, Esquire
Assistant Attorney General
Department of Education
State of Alabama
Montgomery, AL 36130

FOR: Wayne Teague
Alabama State Board
of Education

Solomon Seay, Jr., Esquire
Gray, Seay & Langford
352 Dexter Avenue
Montgomery, AL 36104

FOR: The Board of
Trustees for
Alabama State
University
FOR: Auburn University

Thomas Thagard, Esquire
P. O. Box 78
Montgomery, AL 36101

Walter Merrill, Esquire
500 1st National Bank Bldg.
Anniston, AL 36201

FOR: Jacksonville State
University

Fred Ingram, Esquire FOR: Livingston University
Thomas, Taliaferro,
Forman, Burr & Murray
1600 Bank for Savings Bldg.
Birmingham, AL 35203

Richard F. Calhoun, Esquire FOR: Troy State University
P. O. Box 965
Troy, AL 36081

Frank Ellis, Jr., Esquire FOR: The University of
P. O. Box 587 Montevallo
Columbiana, AL 35051

Robert Potts, Esquire FOR: The University of
107 East College Street North Alabama
Florence, AL 35630

Maxey Roberts, Esquire FOR: The University of
The University of South South Alabama
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Mobile, AL 36688

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Tenth and Constitution
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United States Attorney
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Birmingham, AL 35203

Thomas M. Keeling
Harvey L. Handley, III
Jay P. Heubert
General Litigation Services
Civil Rights Division
Department of Justice
Washington, DC 20530

/s/ Joe R. Whatley, Jr.

Joe R. Whatley, Jr.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.	)	CASE NO.
	)	CV 83-C-1676-S
THE STATE OF ALABAMA,)	
et al.,)	
)	
Defendants.)	
)	

CROSS CLAIMS

The Board of Trustees for Alabama A & M University (hereinafter "Alabama A & M") hereby files the following cross claims:

1. These claims are filed pursuant to the ancillary jurisdiction of this Court. These claims are also brought under 42 U.S.C. §§ 1981 and 1983 and the Fourteenth Amendment to the United States Constitution, with subject matter jurisdiction being based on 28 U.S.C. § 1343, in addition to being under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.*

2. Each and every allegation, claim, and request for relief in the original complaint are hereby realleged and incorporated herein by reference.

3. The racially dual system of public higher education described in the First Claim in the Complaint has discriminated against and damaged Alabama A & M, a traditionally black institution of higher education, in that, among other things, Alabama A & M has been denied its fair share of the

capital and operational funds necessary for it to carry out its mission in a manner consistent with comparable traditionally white institutions of higher education. To correct this discrimination, the Court should require the expenditure of substantial, supplemental funds, according to proof of need and amount to enhance Alabama A & M so that it can attract more students of all races.

4. Likewise, the allegations in the Second Claim of the original Complaint demonstrate discrimination against and damage to Alabama A & M. UAH was established and expanded for racially discriminatory reasons. Especially, the expansion of UAH into education, business, computer science, and other non-engineering programs has damaged Alabama A & M and limited the ability of Alabama A & M to attract students of all races. At least, UAH should be enjoined from continuing to offer programs in education, business, computer science, and other non-engineering areas, and from expanding into any and all other programs. Also, for racially discriminatory reasons, Auburn has been treated more favorably than Alabama A & M in all land grant functions, including but not limited to agricultural teaching and research and farm extension services. To correct this racially discriminatory treatment, the Court should order that Alabama A & M be given control of all land grant functions for North Alabama, while leaving Auburn with those functions for South Alabama. An equalization of land grant funding is necessary to effect this proper distribution of land grant functions.

5. These cross claims are brought against all other defendants to this action.

WHEREFORE, Alabama A & M request that the Court order the relief requested in the original Complaint, the relief requested in the body of this complaint, an award of

attorney's fees and costs, and such other relief as the Court may consider appropriate.

Respectfully submitted,

STEWART, FALKENBERRY &
WHATLEY

Suite 305, 2100 16th Avenue South
Birmingham, AL 35205
(205) 933-0300

By /s/ Joe R. Whatley, Jr.

Joe R. Whatley, Jr.

/s/ Donald W. Stewart

Donald W. Stewart

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing instrument has been served on the following by depositing same in the U. S. Mail, postage prepaid, on this 25th day of July, 1983:

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Dement & Wise
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Montgomery, AL 36101

FOR: George C. Wallace
The Alabama
Commission on
Higher Education
The State of Alabama
The Alabama Public
School and College
Authority

Glenn Powell, Esquire
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Tuscaloosa, AL 35401

FOR: The University of
Alabama

Charles Coody, Esquire
Assistant Attorney General
Department of Education
State of Alabama
Montgomery, AL 36130

FOR: Wayne Teague
Alabama State Board
of Education

Solomon Seay, Jr., Esquire
Gray, Seay & Langford
352 Dexter Avenue
Montgomery, AL 36104

FOR: The Board of
Trustees for
Alabama State
University
FOR: Auburn University

Thomas Thagard, Esquire
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Walter Merrill, Esquire
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University

Fred Ingram, Esquire
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FOR: Livingston University

Richard F. Calhoun, Esquire
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FOR: Troy State University

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/s/ Joe R. Whatley, Jr.

Joe R. Whatley, Jr.

APPENDIX D

**IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

UNITED STATES OF AMERICA,

Plaintiff, CIVIL ACTION NO.

VS.

CV-83-C-1676-S

THE STATE OF ALABAMA,
et al.,

Defendants.

**MOTION AND NOTICE FOR TEMPORARY
RESTRAINING ORDER**

Realigned Plaintiff Board of Trustees for Alabama State University hereby moves this Court for a Temporary Restraining Order restraining and enjoining the defendants Alabama State Board of Education and Wayne Teague, State Superintendent of Education, their agents, employees, successors, attorneys, and all persons in active concert and participation with them, from failing and refusing to take the necessary steps to recertify the following Education Programs at Alabama State University, pending a hearing and determination of realigned plaintiff's Motion for Temporary Restraining Order and/or Preliminary Injunction: Class A Superintendent, Class AA Superintendent, Class A General Supervisor, Class AA General Supervisor, and Class AA Reading Supervisor.

Unless this motion is granted, realigned plaintiff Board of Trustees for Alabama State University will suffer immediate and irreparable injury, loss and damage if defendants are permitted to decertify the above-enumerated programs until a hearing can be had on this motion, as more fully appears from the verified Complaint attached hereto.

DATED this 13th day of August, 1985

Respectfully submitted,
/s/ SOLOMON S. SEAY, JR.
/s/ TERRY G. DAVIS
ATTORNEYS FOR
REALIGNED PLAINTIFF
BOARD OF TRUSTEES FOR
ALABAMA STATE
UNIVERSITY
732 Carter Hill Road
Post Office Box 6215
Montgomery, Alabama 36106
(205) 834-2000

NOTICE OF MOTION

TO: ALL ATTORNEYS OF RECORD FOR
DEFENDANTS IN THE ABOVE-STYLED
CAUSE

Please take notice that on the ____ day of _____, 1985 at 9:00 o'clock a.m., or as soon thereafter as counsel can be heard, the undersigned will bring the above motion on for hearing before the Honorable U. W. Clemon, United States District Judge, at the United States Courthouse, Birmingham, Alabama.

/s/ SOLOMON S. SEAY, JR.
/s/ TERRY G. DAVIS

CERTIFICATE OF COUNSEL

STATE OF ALABAMA)
MONTGOMERY COUNTY)

I, the undersigned attorney of record for Realigned Plaintiff Board of Trustees for Alabama State University, hereby certify that a copy of the above and foregoing motion was mailed to the attorneys for all of the parties on the 13th day of August, 1985.

I further hereby certify that a copy of the above and foregoing motion was hand delivered to the Office of Attorney Charles Coody, the attorney representing defendants Alabama State Board of Education and Wayne Teague, State Superintendent of Education, and that I was advised by Mr. Coody's Office that he would be out of town until Thursday, August 15, 1985.

/s/ SOLOMON S. SEAY, JR.

**IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

CIVIL ACTION

VS.

NO. CV-83-C-1676-S

**THE STATE OF ALABAMA,
et al.,**

Defendants

COMPLAINT

Jurisdiction

1. This action arises under the Fourteenth Amendment to the Constitution of the United States, Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d, *et seq.*, the Civil Rights Act of 1871, 42 U.S.C. §§ 1981 and 1983, and the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$10,000. Jurisdiction of this court is invoked pursuant to the provisions of 28 U.S.C. §§ 1331, 1343(3), and 1341(4), 2201 and 2202.

Parties

2. The parties to this action are correctly enumerated in this Court's Principal Pretrial Order dated February 19, 1985; except Livingston University and the University of Montevallo, whose Rule 41(b) motions were granted.

Allegations of Fact

2. Realigned Plaintiff Board of Trustees for Alabama State University in its statement of Amended Claims, heretofore filed in this case, alleged:

"12. Exercising its authority under *Ala. Code*, Sec. 16-24-14 (1975), the defendant State Board has also prescribed minimum requirements for faculty members in programs for instructional support personnel. Approval of an institution's teacher education program is contingent upon meeting these requirements which include the following:

a. That they hold an earned doctorate, or the equivalent, with a major emphasis in the field of specialization in which the major workload is assigned;

b. That they have a minimum of three years of successful experience as a practitioner in the instructional support area in which the major workload is assigned;

c. That at least one faculty member in each instructional support area in which a program leading to certification is offered shall hold an earned doctorate with an area of specialization in that field.

"13. In May 1984, a review team appointed by the defendant State Superintendent of Education recommended that no students be admitted to the following programs at ASU because faculty members in these programs did not meet some or all of the foregoing faculty requirements:

a. The Class A and Class AA Superintendent Program: of the two faculty members in this program at ASU, both have the appropriate doctorates, but neither has three years experience as superintendent. One faculty member with an appropriate degree and three years of experience as a superintendent is required for the Class A program; two such faculty members are required for the Class AA program.

b. The Class A and Class AA General Supervisor Program: of the two faculty members in this program at ASU, both lack the required doctoral level preparation in supervision, and both lack the three years of experience as a supervisor. One faculty member with appropriate preparation and experience is required for the Class A program; two such faculty members are required for the Class AA program.

c. The Class A and Class AA Reading Supervisor Program: of the two faculty members in this program at ASU, both have the required doctoral level preparation, but neither has three years of experience as reading supervisor. One faculty member with appropriate doctoral level preparation and three years of experience as a reading supervisor is required for the Class A program; two such faculty members are required for the Class AA program.

d. The Class A and Class AA Library Media Program: the one faculty member in this program at ASU is fully qualified, but State Board regulations require a minimum of two faculty members meeting the aforesaid requirements for the Class A program. No additional faculty member is required for the Class AA program."

3. The Amended Claims further alleged that:

"14. The State Board's requirements for faculty in programs for instructional support personnel and the recommendations of the May 1984 review team at ASU have an adverse racial impact on black students and traditionally black institutions, including ASU, and they perpetuate the vestiges of the prior *de jure* system of racial segregation at all levels of public education in Alabama. Because of historical segregation and racial discrimination against black students and black professionals, there are disproportionately few black educators who can satisfy faculty requirements for instructional support personnel programs, namely, three years experience as a superintendent, supervisor, reading supervisor or supervisor of library media and doctoral level preparation in those specific fields of specialization."

"15. The faculty requirements for instructional support personnel programs are not necessary for the successful operation of such programs or for the successful preparation of students in those programs."

"16. The requirements for faculty in instructional support personnel programs have both the purpose and the effect of discriminating against black students, black professionals and traditionally black institutions."

4. The Amended Claims also sought, *inter alia*, preliminary and premanent injunctions restraining and enjoining the defendants from continuing to enforce the minimum faculty requirements for instructional support personnel programs.

5. On, to-wit, the 8th day of August, 1985, the defendant State Board of Education failed adn refused to recertify the Class A and Class AA Superintendent Programs, the Class A and Class AA General Supervisor Programs, and the Class AA Reading Supervisor Program at Alabama State University, allegedly by reason of the fact that Alabama State University failed to meet the faculty experiential requirement. The Board's action had the purpose and effect of decertifying said programs after September 9, 1985. A copy of the State Board of Education's resolution is attached hereto as Exhibit 1, and incorporated herein by reference

and made a part hereof as if herein set forth in full.

6. Faculty personnel assigned to the above-named instructional support personnel programs at Alabama State University are all persons with faculty rank and tenure, and are otherwise qualified except for experiential requirements. Each is black.

7. Experiential requirements adopted by the Board, and the action of the defendant Board in decertifying the programs at Alabama State University have both the purpose and effect of discriminating against black students, black professionals and traditionally black Alabama State University.

8. Unless restrained and enjoined by this Honorable Court, the action of said Board will have the effect of depriving Alabama State University of a major portion of its Teacher Education Program, in violation of due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, and 42 U.S.C. §§ 1981 and 1983.

PRAYER FOR RELIEF

WHEREFORE, Realigned Plaintiff Board of Trustees for Alabama State University respectfully prays that this Court take cognizance of this Complaint for Temporary Restraining Order and for Preliminary Injunction, and after careful consideration of the matters and things set forth herein, enter Temporary Restraining Order and Preliminary Injunction:

(1) restraining and enjoining defendants State Board of Education and Wayne Teague, State Superintendent of Education, and all persons in active concert and participation with them, from failing and refusing to recertify the Class A Superintendent, Class AA Superintendent, Class A General Supervisor, Class AA General Supervisor, and Class AA Reading Supervisor Programs at Alabama State University pending final hearing and determination of this claim;

(2) mandatorily requiring that the defendants State Board of Education and Wayne Teague, State Superintendent of Education, and all persons in active concert

and participation with them, recertify the Class A Superintendent, Class AA Superintendent, Class a General Supervisor, Class AA General Supervisor, and Class A Reading Supervisor Programs at Alabama State University pending final hearing and determination of the merits of this claim.

Respectfully submitted,

/s/ SOLOMON S. SEAY, JR.

/s/ TERRY G. DAVIS

ATTORNEYS FOR

REALIGNED PLAINTIFF

BOARD OF TRUSTEES FOR

ALABAMA STATE

UNIVERSITY

ADDRESS OF COUNSEL:

732 Carter Hill Road
Post Office Box 6215
Montgomery, AL 36106
(205) 834-2000

STATE OF ALABAMA)
MONTGOMERY COUNTY)

I hereby certify that I have read the foregoing Complaint, and know the contents thereof, and that the matters and things set forth therein are true and correct to the best of my knowledge, information and belief.

/s/ BEATRICE MORSE

SWORN TO AND SUBSCRIBED before me this the 13th day of August, 1985.

/s/ Solomon S. Seay, Jr.
NOTARY PUBLIC
STATE OF ALABAMA AT
LARGE
MY COMMISSION
EXPIRES: 2-1-89

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing COMPLAINT upon the following persons, by placing same in the United States Mail, first-class postage prepaid, on this the 13th day of August, 1985:

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/s/ Solomon S. Seay, Jr.

[Exhibits Omitted]

APPENDIX E

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

No. 85-7582

United States of America, *et al.*,
Plaintiffs-Appellees,

John F. Knight, Jr., *et al.*,
Plaintiffs-Intervenors,
Appellees,

v.

The State of Alabama, *et al.*,
Defendants,

The Alabama State Board of Education;
Wayne Teague, State Superintendent of Education,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Alabama.

[Filed June 6, 1986]

Before VANCE and JOHNSON, Circuit Judges, and
ALLGOOD*, Senior District Judge.

JOHNSON, Circuit Judge:

We review here the district court's decision to enjoin the Alabama State Board of Education ("the Board") and its members from refusing to recertify certain Alabama State

* Honorable Clarence W. Allgood, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

University (ASU) teacher education programs. We REVERSE the district court's entry of the injunction against the Board and its members on behalf of ASU, and the entry of the injunction against the Board on behalf of a class of intervening plaintiffs. WE AFFIRM the entry of the injunction on behalf of these intervenors against the Board members acting in their official capacities.

I

The injunctive order at issue here arises from a July 1983 action originally filed by the United States under 42 U.S.C.A. § 1983 and 42 U.S.C.A. § 2000d *et seq.* (Title VI) against the state of Alabama, state education authorities, and all state four-year institutions of higher education in Alabama. This suit charged that Alabama impermissibly operates a dual system of racially segregated higher education.

The court below granted the motion of Alabama State University, a majority-black institution located in Montgomery, Alabama, to realign as a plaintiff. The court also permitted John F. Knight and other faculty, graduates, employees and students at ASU ("the Knight intervenors") to intervene as plaintiffs, and certified them as representatives for a class including graduates of ASU; black adults or minor children in Alabama presently attending, or eligible to attend now or in the future, any public institution of higher education in the Montgomery area; and black citizens who were, are or will become eligible to be employed by such institutions. As a realigned plaintiff, ASU raised several additional claims, seeking chiefly to challenge Alabama State Board of Education requirements for approval of certain teacher education programs. By joint motion, these issues were severed from the main statewide action and set for later trial.

Meanwhile, during the pendency of these proceedings, the state Board voted not to recertify certain undergraduate and graduate teacher education programs at ASU. On motion by ASU and the Knight intervenors the district court enjoined the Board action to maintain the status quo pending resolu-

tion of the substantive questions before it and to preserve its jurisdiction. In reaching its decision the court below concluded that the Board's action was improperly retaliatory — that is, that the Board refused to recertify the ASU education programs in order to punish ASU for bringing suit. It is this injunctive order that comes before us for review.

II

We turn first to certain jurisdictional issues raised by appellant. The state Board argues that the district court did not have jurisdiction to grant ASU an injunction since the latter had no rights under Section 1983 or Title VI and, therefore, no standing to sue for protection of those rights. The Board does not challenge the standing of the Knight intervenors. Further, the Board of Trustees of the University of Alabama, as *amicus curiae*, urges that the district court was without jurisdiction to enjoin the state Board and its members since the state of Alabama and its agencies are immune from suit under the Eleventh Amendment to the United States Constitution.

Although the district court did not discuss these issues in the order before us,¹ we may examine our jurisdiction *sua sponte*. In *Re King Memorial Hosp., Inc.*, 767 F.2d 1508, 1510 (11th Cir. 1985). Logic dictates that parties who seek a

¹In its memorandum opinion in the state-wide action, however, the lower court said:

The contention that ASU and A&M are creatures of the State of Alabama and, as such, lack standing to sue the defendants in this case requires little discussion. In *Washington v. Seattle School District No. 1*, 458 U.S. 457 [102 S.Ct. 3187, 73 L.Ed.2d 896] (1982), the Seattle, Washington School Board — no less a creature of the State of Washington than ASU and A&M are creatures of the State of Alabama — sued the State of Washington under the Fourteenth Amendment. There the Supreme Court held that the State had violated the Equal Protection Clause of the Fourteenth Amendment by the challenged legislative action. The dissent by Justice Powell never once suggested that the school board lacked standing to bring the lawsuit. Further, in the view of the court, *Monell v. NYC Dept. of Social Services*, 436 U.S. 658 [98 S.Ct. 2018, 56 L.Ed.2d 611] (1978), makes it clear that as bodies corporate, ASU and A&M are "persons" within the meaning of 42 U.S.C. § 1983.

preliminary injunction in a suit must have standing to bring suit in the first place. Thus, our first inquiry is whether ASU or the Knight intervenors had standing to sue in the original action under either Section 1983 or Title VI. Second, we must decide, since a state agency is the party enjoined, whether the latter enjoys immunity under the Eleventh Amendment.

We agree with appellant that ASU has no standing to sue under either Section 1983 or Title VI. In so doing, however, we cannot accept appellant's broad contention that ASU, as a creature of state government, has no federally protected rights whatsoever under the Constitution or laws of the United States.

A line of Supreme Court cases including, e.g., *Coleman v. Miller*, 307 U.S. 433, 59 S.Ct. 972, 83 L.Ed. 1385 (1939); *Williams v. Mayor and City Council of Baltimore*, 289 U.S. 36, 53 S.Ct. 431, 77 L.Ed. 1015 (1933); *City of Trenton v. New Jersey*, 262 U.S. 182, 43 S.Ct. 534, 67 L.Ed. 937 (1923); and *Hunter v. City of Pittsburg*, 207 U.S. 161, 28 S.Ct. 40, 52 L.Ed. 151 (1907), stands generally for the proposition that creatures of the state have no standing to invoke certain constitutional provisions in opposition to the will of their creator. A former Fifth Circuit case concluded from this authority that "public entities which are political subdivisions of a state" are "creatures of the state, and possess no rights, privileges or immunities independently of those expressly conferred upon them by the state." *City of Safety Harbor v. Birchfield*, 529 F.2d 1251, 1254 (5th Cir. 1976). However, the latter interpretation — which would bar any suit by a creature of the state against its creator — has not prevailed in this Court.

A subsequent Fifth Circuit decision binding on this Circuit has reviewed the Hunter line — including *Safety Harbor*, *supra* — and concluded that "these cases are substantive interpretations of the constitutional provisions involved; we do not think they hold that a municipality never has standing to sue the state." *Rogers v. Brockett*, 588 F.2d 1057, 1068 (5th Cir. 1979), *cert. denied*, 444 U.S. 827, 100 S.Ct. 52, 62 L.Ed.2d 35 (1979). The Fifth Circuit panel relied in part on the Supreme Court's statement in *Gomillion v. Lightfoot*, 364 U.S.

339, 344, 81 S.Ct. 125, 128, 5 L.Ed.2d 110 (1960), that "a correct reading of the seemingly unconfined dicta of *Hunter* and kindred cases is not that the state has plenary power to manipulate in every conceivable way, for every conceivable purpose, the affairs of its municipal corporations, but rather that the state's authority is unrestrained by the particular prohibitions of the constitution considered in those cases." *Id.*

Thus, no per se rule applies in this Circuit.² In assessing the standing to sue of a state entity, we are bound by the Supreme Court's or our own Court's determination of whether any given constitutional provision or law protects the interests of the body in question. However, if no such determination has been made, it is our task to review de novo whether the state entity has any rights under the particular rule invoked.

In the instant case, the law is clear that ASU, as a creature of the state, may not raise a Fourteenth Amendment claim under Section 1983.³ As long ago as 1939, the Supreme Court in *Coleman, supra*, 307 U.S. at 441, 59 S.Ct. at 976 (1939) (dicta), indicated that "[b]eing but creatures of the State, municipal corporations have no standing to invoke the contract clause or the provisions of the Fourteenth Amendment of the Constitution in opposition to the will of their

²*Cf. City of South Lake Tahoe v. California Tahoe Regional Planning Agency*, 449 U.S. 1039, 1042, 101 S.Ct. 619, 621, 66 L.Ed.2d 502 (1980) (White, J., dissenting from denial of certiorari). Justice White indicated that a per se rule prohibiting a political subdivision from raising constitutional objections to the validity of a state statute was inconsistent with *Board of Education v. Allen*, 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968), in which one of the appellants was a local board of education.

But see City of New York v. Richardson, 473 F.2d 923, 929 (2d Cir.1973); *P. Bator et al., Hart and Wechsler's The Federal Courts and the Federal System* (2d ed.) 182 (1973), in which a per se rule is contemplated. *See also Aguayo v. Richardson*, 473 F.2d 1090, 1100 (2d Cir.1973), *cert. denied*, 414 U.S. 1146, 94 S.Ct. 900, 39 L.Ed.2d 101 (1974), for an indication of the confusion surrounding this issue.

³By its terms, of course, Section 1983 itself creates no substantive rights; it merely provides remedies for deprivations of rights established elsewhere. *City of Oklahoma City v. Tuttle*, ___ U.S. ___, 105 S.Ct. 2427, 2732, 85 L.Ed.2d 791 (1985). Thus, our focus here is directly on Fourteenth Amendment rights.

creator." See also *Town of Ball v. Rapides Parish Police Jury*, 746 F.2d 1049, 1051 n. 1 (5th Cir.1984). ASU argues, however, that since the Supreme Court has more recently — determined that municipalities and other local governing bodies are "persons" who may be sued under Section 1983, *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690, 98 S.Ct. 2018, 2035, 56 L.Ed.2d 611 (1977), they are logically also persons who may bring suit under this section. The former Fifth Circuit, however, has squarely rejected this argument:

The Supreme Court's holding in *Monell* is that by enacting 42 U.S.C. § 1983, Congress intended to make municipalities and other political subdivisions amenable to suits brought under that section. The *Monell* decision does not call into question the principle that a city or county cannot challenge a state statute on federal constitutional grounds.

Appling City v. Municipal Elec. Authority of GA., 621 F.2d 1301, 1308 (5th Cir.1980), *cert. denied*, 449 U.S. 1015, 101 S.Ct. 574, 66 L.Ed.2d 474 (1980).⁴ We are bound by this decision, which extends logically to other creatures of the state such as state universities. ASU thus has no standing to sue or to seek to enjoin the Alabama state board of education under Section 1983 and the Fourteenth Amendment.⁵

⁴See also *Commonwealth of Pa. v. Porter*, 659 F.2d 306, 327 n. 3 (3rd Cir.1981) (en banc) (standing recognized on other grounds): "[S]tates were never deemed to fall within the class of those for whom Congress created a remedy when it enacted § 1983. . . . Allowing a state to bring suit, against its own instrumentalities and against its own officers, for their alleged violations, under color of state law, of federal rights belonging to the very state which it is suing, turns the statute on its head."

⁵*Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 102 S.Ct.3187, 73 L.Ed.2d 896 (1981), is not inconsistent with this position. There, a local school district challenged on Fourteenth Amendment grounds the constitutionality of a state initiative that sought to end the local school district use of mandatory busing to achieve desegregation. The Supreme Court did not address the issue of the school board's standing to sue, although Justice Blackmun's opinion for the court did note that "[w]hile appellants suggest that it is incongruous for a State to pay attorney's fees to one of its school boards, it seems no less incongruous that a local board would feel the need to sue the State for a violation of the Fourteenth Amendment." *Id.* at 487-88 n. 31, 102 S.Ct. 3203-04 n. 31.

We turn next to the question of whether ASU has a right to sue the state under Title VI. To our knowledge, no court has decided this issue.⁶ We conclude that no such right of action exists.

Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." 42 U.S.C.A. § 2000d. In *Hardin v. Adams*, 760 F.2d 1158, 1163-64 (11th Cir.1985), *cert. denied sub nom. Grimmer v. Hardin*, ___ U.S. ___, 106 S.Ct. 530, 88 L.Ed.2d 462 (1985), this Court determined that state universities such as ASU are agents or instrumentalities of the state. Nothing in Title VI or its legislative history suggests that Congress conceived of a state instrumentality as a "person" with rights under this statute. Title VI provides for a comprehensive scheme of administrative enforcement, and the Supreme Court has implicitly recognized a private right of action for individuals injured by a Title VI violation.⁷ Absent any indication of Congressional intent to grant addi-

We are persuaded that *Seattle School District* may be harmonized with the conclusion of this Court that a creature of the state normally has no Fourteenth Amendment rights against its creator. The former Fifth Circuit in *Rogers* explained that the *Hunter* line "adhere[s] to the substantive principle that the Constitution does not interfere with a state's internal political organization." *Rogers, supra*, 588 F.2d at 1070. But *Seattle School District* does not trench on a state's political prerogatives. It simply holds that once a state's political organization is in place, the state may only re-organize that structure (such as a state's delegation of certain educational decision-making powers to local school boards) consistently with the constitutional guarantee of equal protection. *See Seattle School District, supra*, 458 U.S. at 479-82, 102 S.Ct. at 3199-3201.

⁶We note that at least five justices determined in *University of California Regents v. Bakke*, 438 U.S. 265, 287, 98 S.Ct. 2733, 2746, 57 L.Ed.2d 750 (1978), that Title VI proscribes only those racial classifications that would violate the equal protection clause. However, we are not persuaded by this that, because ASU has no Fourteenth Amendment rights, is necessarily has no Title VI rights. The Court's analysis in *Bakke* makes it clear that a decision on Title VI grounds is, nevertheless, distinct from an exercise in constitutional interpretation. *See id.* 438 U.S. at 281, 98 S.Ct. at 2743.

⁷*See Cannon v. University of Chicago*, 441 U.S. 677, 696-97, 99 S.Ct. 1946, 1957-58, 60 L.Ed.2d 550 (1978).

tional rights under this statute to non-private state subdivisions against the state itself, we decline to infer such a right of action by judicial fiat.

Our conclusion that ASU has no standing under Section 1983 and Title VI to seek the injunction *sub judice* does not end our inquiry. The standing of the Knight intervenors remains unchallenged. Thus, we must next determine whether or not their request for a preliminary injunction against the state board of education or its members is barred by the Eleventh Amendment. We hold that injunctive relief against the Board itself is so barred, but that such relief against Board members in their official capacities is permitted.

Again, we begin our analysis with Section 1983. In general, the Eleventh Amendment bars suits by citizens against a state.⁶ Two exceptions to this rule apply: (1) a state may consent to suit in federal court, and (2) Congress may, under certain circumstances, abrogate a state's sovereign immunity. *Atascadero v. Scanlon*, — U.S. —, 105 S.Ct. 3142, 3145, 87 L.Ed.2d 171 (1985). One further doctrine, first set out in *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), permits state officials to be sued in their official capacities for prospective relief under certain circumstances, despite the Eleventh Amendment bar. See *Kentucky v. Graham*, — U.S. —, 105 S.Ct. 3099, 3106 n. 14, 87 L.Ed.2d 114 (1985).

The instant case does not fall under either of the first two exceptions. Alabama has not consented to suit under Section 1983. *Alabama v. Pugh*, 438 U.S. 781, 782, 98 S.Ct. 3057, 57 L.Ed.2d 1114 (1977) (per curiam). Further, the Supreme Court has held that Congress did not intend Section 1983 to abrogate a state's Eleventh Amendment immunity. *Graham*, *supra*, 105 S.Ct. at 3107 n. 17; *Quern v. Jordan*, 440 U.S. 332, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979). Thus, the Knight

⁶The Eleventh Amendment provides that "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890), established that the amendment also proscribes suits by citizens against their own state.

Board could properly be enjoined under Title VI. We turn finally to a review of the injunction itself.

III

An injunction may be reversed on appeal only for abuse of discretion by the district court. *United States v. Jefferson County*, 720 F.2d 1511 (11th Cir.1983). The Board maintains that it was prejudiced by insufficient notice and the "sudden" conversion by the district court of what was originally a temporary restraining order (TRO) proceeding into a preliminary injunction hearing.

The sufficiency of notice prior to the issuance of a preliminary injunction is a matter left within the discretion of the trial court. *Corrigan Dispatch Co. v. Casa Guzman*, 569 F.2d 300, 302 (5th Cir.1978). In this case, the district court had no opportunity to exercise its discretion by ruling on the question of whether notice was sufficient, since appellate did not appear to object, seek a continuance, or in any other way protest the scheduling of the preliminary injunction hearing. This court generally will decline to review issues not raised in the district court. *Harris Corp. v. National Iranian Radio*, 691 F.2d 1344, 1353 (11th Cir.1982).

In any event, we are not persuaded on the merits that the one to three days' written notice (depending on which version is accurate) that appellant received of appellees' motions for injunctive relief was insufficient. Fed.R.Civ.P. 65(a), which governs notice in such cases, provides only that notice must be given; it does not specify how much notice is necessary. As appellant suggests, *Granny Goose Foods, Inc. v. Teamsters*, 415 U.S. 423, 434 n. 7, 94 S.Ct. 1113, 1121 n. 7, 39 L.Ed.2d 435 (1974), does indicate that "[t]he notice required by Rule 65(a) before a preliminary injunction can issue implies a hearing in which the defendant is given a fair opportunity to oppose the application and to prepare for such opposition." (In *Granny Goose*, the defendant received only same-day informal notice of the hearing by telephone.) But appellant here does not demonstrate persuasively that it was prejudiced by short notice, nor does it show how its

intervenors are barred from seeking this injunction against the state Board under Section 1983.

However, in an injunctive or declaratory action⁹ grounded on federal law, parties may overcome the state's immunity by naming state officials as defendants. *Graham, supra*, 105 S.Ct. at 3107 n. 18. The intervenors' motion for a preliminary injunction satisfied this requirement by seeking to enjoin "the Alabama State Board of Education *and its members*, from failing to approve teacher training programs at Alabama State University [emphasis added]." The motion did not specify whether the intervenors sued these Board members in their official or personal capacities. Although we do not encourage such omissions, the Supreme Court has indicated that "[t]he course of proceedings will typically indicate the nature of the liability sought to be imposed." *Id.* 105 S.Ct. at 3106 n. 14; *Brandon v. Holt*, 469 U.S. 464, 105 S.Ct. 873, 877, 83 L.Ed.2d 878 (1985).

We think it clear that in this case the intervenors sought to enjoin Board members in their official capacities as state officers. The Board members' decision not to approve the teacher education programs at issue was an official action consonant with their view of official duty, not one undertaken by individuals acting independently of their offices. Thus, an act representing the execution of government policy inflicted the injury in this case and may be enjoined despite the Eleventh Amendment bar. See *Monell, supra*, 436 U.S. at 694, 98 S.Ct. at 2037.

Since we determine that the Eleventh Amendment permits the Knight intervenors to secure an injunction against state Board members under Section 1983 and the Young exception, we need not reach the difficult question of whether the

⁹The intervenors' motion for a preliminary injunction against a state entity, of course, is not identical to an action for injunctive relief against such a body. In the latter case, the act to be enjoined is the alleged violation of federal law sued upon. In the former situation, however, the injunction may issue against an act that is not itself alleged to be a violation of law, but one that will instead disturb the status quo sufficiently to make a remedy for the violation of law doubtful. We assume, despite this distinction, that the Young exception applies similarly in both cases.

argument would have been materially different with more warning. A district court is not at leisure to permit those against whom injunctions are sought to sharpen their arguments indefinitely.

Appellant's argument that the lower court erred in converting what was originally a temporary restraining order hearing into a preliminary injunction proceeding is similarly unavailing. Again, the Board failed to complain of the alleged error to the district court. Further, since a TRO and a preliminary injunction are somewhat similar, it is not uncommon to find that the two have not been properly distinguished. See, e.g., *Fernandez-Roque v. Smith*, 671 F.2d 426, 429 (11th Cir. 1982). The former Fifth Circuit has indicated that "[w]here the opposing party has notice of the application for the temporary restraining order, such order does not differ functionally from a preliminary injunction. *Dilworth v. Riner*, 343 F.2d 226, 229 (5th Cir. 1965). In short, we cannot conclude that the conversion of a TRO hearing to a preliminary injunction hearing — particularly in the case at bar, in which appellees' motions in one way or another mentioned a preliminary injunction as well as a TRO — is so radical a procedure that it is presumptively an abuse of discretion. With no showing of actual prejudice to appellant from the conversion, we must decline to hold the district court in error.

Finally, we turn to the Board's argument that appellees failed to meet their burden of establishing a substantial likelihood that they would prevail on the merits of the controversy.¹⁰ Specifically, appellant challenges findings made by the district court: (1) that the Board's failure to approve ASU programs was discriminatory and retaliatory,

¹⁰To secure a preliminary injunction, a plaintiff must establish four factors: (1) a substantial likelihood that the plaintiff will prevail on the merits, (2) a substantial threat that the plaintiff will suffer irreparable injury if the injunction is not granted, (3) that the threatened injury to the plaintiff outweighs the harm to the defendant, and (4) that the grant of an injunction will not disserve the public interest. *Johnson v. United States Department of Agriculture*, 734 F.2d 774, 781 (11th Cir. 1984). Before this Court appellant disputes only the lower court's conclusions on the first point.

and (2) that the faculty experience requirement for approval of teacher education programs challenged by ASU in the severed action was potentially discriminatory.

We agree that the latter finding cannot support injunctive relief since the likelihood of success on "the merits" considered there solely involves the merits of ASU's severed claims, and we have concluded that ASU has no standing to bring such claims. Further, we regard the finding of retaliatory motive by the Board as simply immaterial to the question of whether a preliminary injunction should issue, since a plaintiff in seeking such an injunction is not asked to establish, among the four factors, anything at all about the motive for the enjoined act.

Nevertheless, we hold that the trial court's entry of the preliminary injunction sought by the Knight intervenors against the Board was entirely appropriate. The purpose of a preliminary injunction is to prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits. *Corrigan Dispatch, supra*, 569 F.2d at 302. See also *University of Texas v. Camenisch*, 451 U.S. 390, 395, 101 S.Ct. 1830, 1834, 68 L.Ed.2d 175 (1980). Preliminary injunctive relief may be necessary to insure that a remedy will be available. *Gresham v. Windrush Partners, Ltd.*, 730 F.2d 1417, 1424 (11th Cir. 1984), *cert. denied sub nom. Windrush Partners v. Metro Fair Housing Services*, ___ U.S. ___, 105 S.Ct. 249, 83 L.Ed.2d 187 (1984). We accept as unchallenged the district court's factual conclusion that:

[t]he total effect of the Board's non-approval of most of ASU's teacher education programs if left unredressed, will be devastating. Without new students, the College of Education will be forced to close its doors within three years. In the meantime, the college's faculty, as well as the faculty of the College of Arts and Sciences, will be displaced. The attractiveness of ASU as an unaccredited

institution, both to black and prospective white students, will be nonexistent.¹¹

Given this finding by the lower court, which is entitled to substantial deference, see *Anderson v. City of Bessemer*, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985), it is clear that even the partial demise of ASU would impede the ability of the trial court — and this Court on review — to remedy any violation of law proved in the state-wide action originally brought by the United States and joined by the Knight intervenors. The trial judge was evidently persuaded that the intervenors had a substantial likelihood of success on the merits in the latter action, particularly since the judge, who had heard argument in the state-wide case when the injunction was entered, later held in the plaintiffs' favor. Although we do not intimate anything with respect to this Court's ultimate holding on the merits, we are satisfied that the Knight intervenors made out a case sufficient to support a preliminary injunction.

Accordingly, we AFFIRM the court's entry of this injunction, on behalf of the intervenors, against the members of the state Board in their official capacities. We REVERSE the district court's entry of any injunction on behalf of ASU, or against the state Board itself.

ALLGOOD, Senior District Judge, concurring specially:

I concur in the judgment of the court, and add the following:

No matter how artfully phrased, demands by predominately black universities, or by persons attempting to assert their interests, which draw their students, faculty and staff from predominately white market areas, for preferential treatment or status as vicarious victims of prior discrimina-

¹¹The Board at most argues that any harm to ASU resulting from the action of the former was self-inflicted — that is, that ASU provoked disapproval of its programs by its "blatantly defiant attitude toward regulations duly adopted by the State Board of Education." Whether the Board was justified in its decision not to recertify the programs at issue is again immaterial here. We simply conclude that the Board's decision, if it is not enjoined, will render a remedy in the main action meaningless.

tion, presuppose that such universities have some legally protectable interest in remaining predominately black, and that the predominately black university must be one of the mechanisms through which prior unlawful racial separation and its vestiges are corrected. State created insitutions have no such right, and the State is not limited in that way. It may well be that problems with the quality of some public educational institutions are so pervasive and ingrained that black students will be hurt, not helped by the perpetuation of those institutions.

This case could go a long way toward deciding the future of the university system in this State.

If, under appropriate standards and legal principles, liability of the State of Alabama, or any of its institutions is upheld, an issue not before us on this appeal, the District Court will be charged with approving an appropriate remedy, giving due deference to suggestions made by state authorities. *See generally Swann v. Charlotte Mecklenburg Board of Education*, 402 U.S. 1, 15-16, 91 S.Ct. 1267, 1275-76, 28 L.Ed.2d 554 (1971). If, in that event, in submitting a plan the State concludes that the most effective, educationally sound, and least expensive manner to remedy a violation is to close some colleges, or to merge them under the boards of the State flagship institutions, I see no constitutional or statutory barriers to that being done. *Cf. Ayers v. U.S.*, 769 F.2d 311 (5th Cir. 1985). However, that question must be left for another day. In the meantime, all parties to this expensive suit have a duty to and should strive for a negotiated solution to it.

No. 87-1200

Supreme Court, U.S.

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

BOARD OF TRUSTEES FOR ALABAMA STATE UNIVERSITY;
BOARD OF TRUSTEES FOR ALABAMA A & M UNIVERSITY;
JOHN KNIGHT, et al.; and
NORMALITE ASSOCIATION, et al.,

Petitioners,

v.

AUBURN UNIVERSITY, et al.,

Respondents.

**PETITIONERS' REPLY BRIEF
IN SUPPORT OF CERTIORARI**

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PETITIONERS' REPLY BRIEF IN SUPPORT OF CERTIORARI

Four sets of Alabama respondents have filed briefs in opposition to the petition for a writ of certiorari. They raise numerous arguments which threaten to obscure the real issues in this case more than to clarify them.¹

The United States has also filed a brief in opposition. That brief agrees with petitioners that the court of appeals erred in requiring the disqualification of the district judge, and it agrees with petitioners that there is a conflict in the circuits. The United States, however, then parts company with the petition and asserts that certiorari should not be granted. Petitioners believe that the serious questions raised in the petition concerning the treatment of the recusal issue below have not been answered by any of the respondents,² that the conflict between the court below and other circuits is significant, and that certiorari should therefore be granted.

1. The treatment of the recusal issue in the court below was unorthodox in the extreme, and, despite filing 98 pages of briefs in opposition, none of the respondents seriously attempts to demonstrate the contrary.

The court of appeals ordered Judge Clemon recused on three grounds. Auburn has acknowledged that two of these, the ground relating to the Alabama State University Board

¹ For convenience of citation, all the responses to the petition for certiorari will be cited as "Brief in Opposition," preceded by the name of the specific respondent, *e.g.*, "Auburn Brief in Opposition."

² Auburn begins by arguing that the recusal issue is insignificant because a new trial was required in any event as a result of the court of appeals' dismissal of the Title VI claims for lack of program specificity under the rule of *Grove City College v. Bell*, 465 U.S. 555 (1984). Petitioners do not agree that the dismissal of the Title VI claims, even if correct, would require a new trial (since the district court's findings rested equally or more heavily on the fourteenth amendment claims), but it is beside the point now that the court of appeals' ruling on Title VI has been overtaken by the passage of the Civil Rights Restoration Act, P.L. 100-259. Therefore, it is clear that a reversal on the recusal issue would reinstate the district court's decision.

of Trustees nominee and the ground relating to the Alabama A & M University appropriations bill, were in its possession while the case was still in the district court, in one instance at least a year *before* the trial; yet these grounds were saved until they could be presented in the first instance to the court of appeals. There, it is undisputed that the following things took place: (1) the grounds were entertained without the slightest inquiry about why they had been withheld, (2) the allegations were accepted as true without undergoing any factual scrutiny in any court, and (3) because there was no factual scrutiny, the court of appeals made factual findings—which was not its proper function in any event—which were utterly without foundation. These findings also were flatly in error.

The first ground alleged was that as a State Senator Judge Clemon played a key role in shaping the governing boards of the institutions which were parties to this case, including the claim that he blocked one nomination on racial grounds. Auburn's *sole* basis for this ground was a newspaper clipping, and that clipping was the *sole* basis for the court of appeals' decision that Judge Clemon should be disqualified on this ground. Pet. App. 23a-25a. No factual inquiry on this issue ever took place, nor could it have, since the clipping was never in the record.³

The second ground alleged was that as a State Senator Judge Clemon co-sponsored a bill to provide capital funds for A & M's physical plant. Auburn supported this ground by referring to a page of the Senate Journal showing the introduction of the bill, and showing the list of seven co-sponsors, one of whom was then-Senator Clemon. The court

³ It seems unimaginable to be arguing in this Court about the contents of the record below, but petitioners must say as firmly as possible that Auburn's statement that the news clipping "was in the record," Auburn Brief in Opposition, p. 8 n. 3, is a serious misrepresentation. The only appearance of the news clipping in the district court was its attachment as an exhibit to one deposition (the deposition of a witness who could not identify the clipping), and that deposition was never admitted at trial. Unfortunately, the unorthodox procedure of the court of appeals invited disputes such as this.

of appeals did not rely on the mere introduction of the bill, which would not have been disqualifying, but went on to embellish that fact with a series of additional "findings" that led it to disqualify Judge Clemon on this ground. Central to that decision was the court of appeals' "finding" that "the stated premise of this bill was that the facilities of A & M were inferior to those of the historically white universities." Pet. App. 25a. No factual inquiry ever took place concerning the A & M appropriations bill, and no evidence supports the court of appeals' "findings." The unreliability of the "findings" is typified by the fact that the central finding concerning "the stated premise of the bill" is plainly erroneous, as the slightest factual inquiry would have revealed.⁴

In its treatment of these issues,⁵ the court of appeals repeatedly resolved disputed issues and *found* "facts" despite the absence of any inquiry either in the district court or in the court of appeals. These "facts" related to both the threshold issue of Auburn's timeliness in raising the alleged disqualifying grounds, and the substance of those grounds. Not surprisingly, in light of the procedures it followed, the court of appeals' "facts" as to both timeliness and substance are virtually devoid of evidentiary support,⁶ and many of its "facts" remain a total mystery.

⁴ Because Auburn's Brief in Opposition, p. 9, echoes the court of appeals' finding about "the stated premise of the bill," petitioners have lodged a copy of the actual bill, S. 387, with the Clerk of this Court. No matter how many times one reads the entire bill, one will not find *any* "stated premise" or anything else remotely corresponding to the court of appeals' description.

⁵ The third ground for recusal, Judge Clemon's role as a private practitioner in the case of *Lee v. Macon County Bd of Educ.*, saw the court of appeals overturn findings of fact by the district court (Judge Dyer) without finding that he had committed plain error or, for that matter, even mentioning Judge Dyer's findings. This issue is addressed at pp. 7-9, *infra*.

⁶ The court of appeals' statement that Auburn "did not discover relevant information about Judge Clemon's activities as a state legislator until late in the litigation, and raised this ground for disqualification

2. These procedures are at the heart of several serious conflicts between the lower court and other circuits, set forth in the petition.

a. Most significantly, the court of appeals entertained grounds for recusal which had not been raised below, and without remanding for determination of the facts. The petition cited cases in the Fifth, Sixth, and Ninth Circuits in which courts of appeals, confronted with newly raised grounds for recusal, have held that there must be a remand for development of a factual record, both as to timeliness and as to the merits of the grounds. Petition, pp. 15-16. In fact, *no* case cited by any of the respondents, and *no* case that petitioners have found, has ever followed the procedure used in the lower court in the instant case.⁷

The United States acknowledges the cases in other circuits in which remands were ordered, and cites no cases to the contrary, but suggests that there is no conflict because those cases all involved disputed factual issues. United States Brief in Opposition, p. 9. The United States does *not* say there were no disputed factual issues in the instant case, however, and it does not argue that the court of appeals said so; the United States says only that "the

at the first available moment," Pet. App. 24a n. 49, is demonstrably wrong on both counts, and even Auburn's Brief in Opposition nowhere attempts to defend this position.

⁷ Auburn's Brief in Opposition disagrees, but its cases contradict its position:

The Court of Appeals' decision to entertain the disqualification issue without further proceedings in the district court does not conflict with other circuits. The Court of Appeals certainly had jurisdiction to rule on recusal issues in the first instance, see *Price Brothers Co. v. Philadelphia Gear Corp.*, 629 F.2d 444, 447 (6th Cir. 1980); *Potashnick v. Port City Construction Co.*, *supra*, [609 F.2d 1101 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980)]."

Auburn Brief in Opposition, p. 8 n. 3. The problem with this statement is that in both the *Price Brothers* and *Potashnick* cases the courts of appeals *did* remand to the district court for factual findings as to the newly raised grounds, and there is no suggestion in either case that they considered proceeding otherwise.

court of appeals *apparently concluded* that the facts material to the disqualification issue were not in dispute and that the issue could be resolved without further factfinding by a district court." *Ibid* (emphasis added). In petitioners' view, there can be no question that Auburn's grounds for recusal involved disputed issues of fact, that the court of appeals' acceptance of them without a remand conflicted with the cases in other circuits, and that the United States' strained reading of the cases simply underlines how clear the conflict in the circuits is.

b. The second major conflict had to do with the timeliness requirement. The petition cited cases in the Second, Fifth, and Ninth Circuits imposing a timeliness requirement, and a decision in the Seventh Circuit rejecting such a requirement. The decision below is unclear, since it both suggests that there is no timeliness requirement and holds that if there is such a requirement it was somehow met in this case.

In either event, however, the decision below is in conflict with other circuits. If, as petitioners believe, the court of appeals rejected any timeliness requirement, it conflicts with the circuits that impose such a requirement. If, as the United States believes, United States Brief in Opposition, p. 9, the court of appeals accepted a timeliness requirement but found that it was satisfied, its having made such "findings" without any remand or other fact-finding process conflicts with the circuits that have ordered remands to develop factual records in connection with newly raised grounds for recusal.

The case of *United States v. Conforte*, 457 F. Supp. 641 (D. Nev. 1978), *aff'd*, 624 F.2d 869 (9th Cir. 1980), *cert. denied*, 449 U.S. 1012 (1980), illustrates both prongs of the conflict. There, while Conforte was appealing a criminal conviction, he raised two separate grounds on which he alleged the district judge should have been disqualified. One ground arose from correspondence with the district judge over a bridge club membership, and the other arose from comments made by the judge at a party. The court

of appeals remanded the case to the district court to conduct an evidentiary hearing, and the district court made factual findings and ruled that recusal was unwarranted on either ground. As to the bridge club membership issue, the court found as a fact that Conforte had notice of the matter before trial,⁸ so his raising of the issue when he did was untimely. As to the comment at the party, the court found as a fact that the issue was timely, because Conforte had not known about this matter previously, but that on the merits the facts did not support recusal under 28 U.S.C. § 455. The Ninth Circuit, in a detailed opinion by then-Judge Kennedy, affirmed both these rulings. The approach of the *Conforte* case is the standard one in other circuits, and it was disregarded in the instant case.

Moreover, timeliness should be a special concern in the instant case, because the deliberate withholding of new grounds for disqualification by a party which had already claimed that the judge's race undermines his impartiality, gives the appearance that it is continuing to pursue its improper racial objective through manipulation of the judicial process.⁹

c. The petition also cited a third conflict in the circuits, on the question whether a recusal order must be accompanied by retroactive relief granting a new trial. No respondent disputes that such a conflict exists. It is currently at issue in two cases pending in this Court. *Liljeberg v. Health Services Acquisition Corp.*, 796 F.2d 796 (5th Cir. 1986), *cert. granted*, No. 86-957 (argued December 9, 1987; to be reargued April 25, 1988); *Leaman v. Ohio Dept of Mental Retardation*, 825 F.2d 946 (6th Cir. 1987),

* As Auburn did with regard to the ASU board nomination issue.

* Contrary to the United States Brief in Opposition, p. 10 n. 7, petitioners did not suggest that the disqualification *decision* was based on Judge Clemon's race. What petitioners *do* say, as stated on the referenced page, and as Judge Dyer found, is that the recusal *motion* was based on Judge Clemon's race. That motivation contributes to the importance of reviewing the decision below in order to make certain that such racially motivated tactics are not rewarded.

petition for cert. filed, No. 87-706 (Oct. 20, 1987). As the United States points out, United States Brief in Opposition, p. 10 n. 6, petitioners have not formally requested that this case be held pending the decision in *Liljeberg*, but unquestionably the decision in that case is likely to bear on some of the issues here.

3. Respondent Teague argues that any defects in the handling of Auburn's two new grounds for recusal were immaterial in light of the presence of a third ground for recusal, Judge Clemon's role in *Lee v. Macon County Bd of Educ.* Here again, however, the court of appeals overstepped its proper role by overturning district court findings of fact which were not plainly erroneous, and which it did not find to be plainly erroneous.

The original recusal motions had argued that Judge Clemon's participation as a lawyer in the case of *Lee v. Macon County Board of Education* gave him personal knowledge of the facts in the instant case. Judge Dyer exhaustively analyzed that claim and found that there were many *different* cases called *Lee v. Macon County*. Pet. App. 46a-48a, 53a-56a. One aspect of *Lee v. Macon County* involved desegregation in higher education and included some of the same parties who are defendants in the instant case; Judge Clemon was not involved in that aspect of *Lee v. Macon County*. There were approximately 100 *other* cases captioned *Lee v. Macon County*, however, each one involving a local (*i.e.*, city or county) system of elementary and secondary schools. These were entirely separate cases from the higher education component, and Judge Dyer so found. Judge Dyer analyzed the cases closely and found as a fact that Judge Clemon's involvement in two individual cases captioned *Lee v. Macon County* had nothing to do with the higher education case but was limited to the elementary and secondary school systems of Sumter County and the City of Anniston.

He found as a fact that these cases did not involve the same matter in controversy as litigation involving higher education. Pet. App. 54a. The court of appeals, however,

made a contrary finding of fact, holding that Judge Clemon's involvement with elementary and secondary education—even as limited to two small school systems—*was* the same matter in controversy as the instant case involving higher education. The linchpin of this holding was the admission into evidence in the instant case of a published report concerning attrition of black high school principals. The court of appeals did *not* hold that Judge Clemon had prior extra-judicial knowledge of the report.¹⁰ Rather, it held that introduction of a report on the subject of high school principals in the instant higher education case showed that desegregation at the high school level was relevant to higher education, and, therefore, that Judge Clemon's prior access (as a lawyer) to facts relating to elementary and secondary education in the Anniston and Sumter County cases *was* the equivalent of access to disputed evidentiary facts in the instant case, *i.e.*, that Judge Clemon's Anniston and Sumter County cases *were the same case* as the instant case. In so holding, the court of appeals flatly reversed Judge Dyer's finding of fact in the district court that they were *not* the same case.¹¹ Yet, the court

¹⁰ The published report was cited in an earlier opinion, 453 F.2d 1104 (5th Cir. 1971), dealing with still another piece of *Lee v. Macon County* with which Judge Clemon was unconnected—the elementary-secondary school system in the Town of Muscle Shoals.

¹¹ The principal discussion of *Lee v. Macon County* is in the response of Wayne Teague, Superintendent of Education, which is filed jointly with the response of the Alabama State Board of Education. State Board Brief in Opposition, pp. 17-19. He argues that facts regarding desegregation of an elementary-secondary school system should be relevant to a higher education desegregation case. But the statutory question under 28 U.S.C. § 455(b)(1) is not whether the two topics raise similar legal issues, but whether the two are the same proceeding so that participation in one specific elementary-secondary education case would necessarily have given Judge Clemon "personal knowledge of disputed evidentiary facts concerning the [*i.e.*, *this*] proceeding."

Judge Dyer made a finding of fact that it did not. Neither the court of appeals nor respondent Teague has claimed that his finding was plainly erroneous, nor has there been any showing that it could have been. Petitioners have already shown why the mere introduction of an

of appeals, far from purporting to find that Judge Dyer had committed plain error, never mentioned Judge Dyer's finding *at all*, but simply substituted its finding for his. Compare *Pullman-Standard v. Swint*, 456 U.S. 273 (1982).

4. Turning to the standing issue, the United States and, to a greater or lesser degree, the other respondents argue that there is no conflict in the cases because the court of appeals' holding did not bar Alabama State University and Alabama A & M University from making claims in their representative capacity on behalf of their students and faculty, or from making claims based on their Supremacy Clause-based obligation to obey the Constitution. Indeed, the United States and, to a greater or lesser degree, several other respondents, acknowledge that decisions of this Court and several circuits hold that parties who assert claims of the type raised by these petitioners do have standing to make such claims.

Instead, respondents argue that the decision below was limited to a holding that these state institutions cannot assert interests of their own as against the State, and that the decision simply presents petitioners with a pleading problem which requires them to allege the basis for standing more explicitly. But the University petitioners' pleadings, and their court of appeals' briefs, made it clear that the basis for realignment was their recognition of their obligation to promote desegregation and to protect the constitutional rights of their students and faculty. Those

exhibit at trial was not sufficient to make the cases the same. Respondent Teague also says that *Lee v. Macon County* was mentioned many times during the trial, but that is a red herring because those references were to portions of *Lee v. Macon County* which established the basic law of desegregation in Alabama, chiefly 231 F. Supp. 743 (M.D. Ala. 1964); and 267 F. Supp. 458 (M.D. Ala.), *aff'd*, 389 U.S. 215 (1967). Those were portions of *Lee v. Macon County* in which, as Judge Dyer found, Judge Clemon was *not* involved.

(Respondent Teague does say, at p. 17, that Judge Clemon participated as counsel in the case reported at 317 F. Supp. 103 (M.D. Ala. 1970), *aff'd*, 453 F.2d 524 (5th Cir. 1971), but that is obviously and plainly wrong, and flatly contrary to the finding of Judge Dyer.)

pleadings further made it clear that actions of the State and state agencies, including defendants in this case, had prevented and were preventing the University petitioners from fully meeting their constitutional obligations and fully protecting the interests of their students and faculty.¹²

The court of appeals did not acknowledge these arguments or address the cases cited by the petitioners. Its decision conflicts with those other holdings, threatens the ability of the University petitioners to carry out their constitutional obligations, and creates the possibility that relief in this case, if subsequently held to be warranted, will fail to eliminate the longstanding vestiges of segregation and fail to cure the constitutional violations.¹³

5. The serious questions and conflicts raised by the court of appeals' decision in this case, and highlighted in the petition, have not been answered in the responses. Petitioners pray that this Court grant the writ of certiorari.

¹² Several of these pleadings are printed as Appendices to the State Board Brief in Opposition, particularly Appendices C, E, F, and G.

¹³ Several of the respondents raise a host of irrelevant and hyper-technical issues. For example, there is an assertion that the University petitioners' desire for realignment was simply in order to avoid having relief entered against them. Of course, the record in this case refutes that assertion, since the University petitioners acknowledged liability but sought *more extensive* relief. Another argument is that since the University petitioners were found by the court of appeals to have been improperly realigned, they were not parties in the court of appeals and therefore not entitled to petition this Court for review. This argument ignores the fact that the University petitioners consistently styled themselves appellees in the court of appeals, a status that was unquestionably correct since they were seeking to defend the judgment. That status was unaffected by the determination whether they were properly realigned as plaintiffs in the district court or whether they should have remained as defendants in the district court. Finally, several respondents argue that even if the petitioners' board members had constitutional obligations, the real parties were the universities or their boards of trustees as bodies rather than as individual members. This argument is meaningless, since the obligation to obey the Constitution applies equally to public bodies and their members. Compare *Brandon v. Holt*, 469 U.S. 464 (1985) (action against public official in his official capacity is tantamount to action against the official body).

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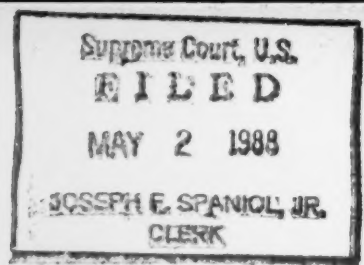
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April 5, 1988

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9
No. 87-1200



In The
Supreme Court of the United States
October Term, 1987

BOARD OF TRUSTEES OF
ALABAMA STATE UNIVERSITY, *et al.*,
v. *Petitioners,*
AUBURN UNIVERSITY, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL RESPONSE OF
AUBURN UNIVERSITY
IN OPPOSITION TO CERTIORARI

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INTRODUCTION

Petitioners' Reply Brief in support of certiorari does not address new arguments made for the first time in the briefs in opposition but, rather, revisits issues raised in the Petition. The Reply Brief does not, therefore, comply with Supreme Court Rules 22.5 or 21.3. It should be considered an untimely addendum to the Petition and stricken. If the addendum to the Petition is accepted, Auburn University requests that it be permitted to respond as it would have if such arguments had properly been included in the Petition. In connection with this brief, Auburn University has submitted to the Clerk Volume 1 of the attachments to its principal brief in the Court of Appeals, which consists of exhibits offered at trial and other matters of record in the trial court.

1. The Court of Appeals' Findings Relative To The Trial Judge's Sponsorship Of The Alabama A&M University Capital Funds Bill Are Supported By The Record.

Defendants' Exhibit AU5928A (at p. 16-23 of the attachments to the Brief of Appellant Auburn University in the Court of Appeals) is Alabama A&M University's proposal for the capital funding bill which became S387, lodged by Petitioners with the Clerk of this Court. Exhibit AU5928A contains a statement of justification and rationale for the proposed allocation of funds and includes a draft bill. The draft bill provides in its synopsis that the proposed \$10,000,000.00 appropriation is "for the purpose of providing and improving certain facilities at the University so as to *bring it up to an equal status with other institutions of higher*

learning in the State of Alabama and surrounding areas." The proposed bill and the bill co-sponsored by the trial judge are identical with respect to the total appropriation and the specific uses for the funds. Both provide for a total appropriation of \$10,000,000.00, \$1.5 million of which is to be used for "constructing and equipping a fine arts building," \$400,000.00 to be used for the acquisition and construction of a "central receiving warehouse," \$400,000.00 to be used for the acquisition of "land to be used in research and agriculture," \$900,000.00 for "general campus improvement," \$2.3 million to be used for "additions and improvements to Carter Hall," \$1.5 million for "additions to and improvements of classroom buildings," \$1.5 million for "additions and improvements to the south wing of Carver Complex," \$1.5 million for "additions and improvements of J. F. Drake Library," and that "up to 20% of the funds . . . appropriated for any project" may be shifted to any other project as the need so arises.

The statement of justification and rationale for the bill contained in Exhibit AU5928A cites the following in support of the proposed appropriation:

When funds are in short supply, usually maintenance and renovation needs are neglected in favor of funding academic programs – mostly salaries. . . . A major renovation of existing facilities and the building of additional facilities are essential to carry on the minimum programs at our institution.

. . .

While Alabama A&M University has a beautiful natural setting, many problems exist that hamper progress . . .

- narrow, worn streets without curbs and gutters
- too few streets to accommodate present day traffic
- inadequate parking facilities
- too few sidewalks
- inadequate campus lighting
- too few and inadequate traffic safety devices
- poor campus landscape

Most streets on campus are too narrow and in dire need of general repair, including resurfacing. Few, if any, streets have been resurfaced during the past 20 years. In addition, none of the streets have curbs and gutters.

The trial court found as fact that:

The extent of renovations over the last 30 years at A&M adversely affects its ability to attract white students. Vehicular and pedestrian roadways and sidewalks are in serious need of repair . . . buildings are boarded up. The overhead power lines, bare ground, surface erosion and parking lots interspersed among the buildings detract from A&M's overall appearance. Substantial renovations and new construction are necessary to enhance A&M's attraction as to white students.

The similarity between the trial court's findings and the statement of justification for the bill co-sponsored by the trial judge fully support the Court of Appeals' conclusions that "the stated premise of this bill was that the facilities of A&M were inferior to those of the historically white universities," and that "Judge Clemon was making factual determinations about bills and legislative fights in which he played an active part."

2. The Court of Appeals' Holding With Respect To The Trial Judge's Involvement In The Trustee Confirmation Process Was Supported By The Record.

The Petitioners also misrepresent the basis of the Court of Appeals' finding with respect to the trial judge's participation in the confirmation of the boards of trustees of the various universities. The newspaper clipping in which the trial judge was quoted as having opposed the confirmation of a nominee to the Board of Trustees of predominantly black Alabama State University (ASU) on the ground that he was white was not, as Petitioners allege, "Auburn's sole basis" for recusal. Notwithstanding the fact that the Petitioners never disputed the accuracy of the statements attributed to the trial judge, the trial judge's participation in the nomination process was corroborated by the official record of the Alabama State Senate published in the *Alabama Senate Journal*. The *Senate Journal* was sufficient to support the Court of Appeals' holding that "it is clear that Judge Clemon's activities in the Senate were relevant to and plainly affected the ultimate outcome of the nomination and confirmation process for the board of trustees of the defendant institutions. Yet Judge Clemon explicitly found at trial that the composition of defendants' governing boards was a relevant and important factor in his finding of liability. . . . In his examination of the composition of these governing boards, Judge Clemon was in part examining his own handiwork."

The newspaper clipping about which Petitioners complain, but the accuracy of which they do not dispute, was attached to two depositions in the court below, both of which were filed in the district court and comprise part of the record on appeal. One of these, the deposition of the plaintiffs' expert Steven J. Wright, was offered in lieu of cross-examination after the trial court unduly limited the cross-examination of Dr. Wright. The trial court denied admission of the deposition and both the University of Alabama System and Auburn University asserted that denial as error on appeal. At any rate, there was no necessity for the clipping to be admitted into evidence at trial in order for the Court of Appeals to consider it on the recusal issue. See *Potashnick v. Port City Construction Co.*, 609 F.2d 1101 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980).*

**Potashnick and Price Brothers v. Philadelphia Gear Corp.*, 629 F.2d 444, 447 (6th Cir. 1980) do, despite Petitioners' protestations, support the Court of Appeals' action on recusal in this case. In *Potashnick*, the Court of Appeals remanded to the district court *on the motion of the movant for recusal*, ostensibly because *none* of the matters supporting recusal were in the court file. See 609 F.2d 1106, 1114-15. Moreover, the *Potashnick* court conducted its own review of the record with no deference given to the findings of the district court on the recusal issue. Similarly, in *Price Brothers*, the Court of Appeals remanded "for an evidentiary hearing and report" because the "present state of the record raises many questions that must be answered prior to any further consideration of the other issues raised on this appeal." 629 F.2d at 447. The Court of Appeals, however, "reserve[d] jurisdiction to consider and pass upon the report." Thus, these cases support the Court of Appeals' *de novo* review of the record in this case on the recusal issue.

3. The Facts Relied Upon By The Court of Appeals Are Not In Dispute.

The Petitioners contend that the recusal issue involves disputed facts, without pointing to any facts in dispute. They have in fact not disputed the trial judge's own statements with regard to his involvement in *Lee v. Macon* or that evidence regarding the issue in that case with which he was involved was received in evidence at the trial of this case. They do not dispute that the A&M capital appropriations bill was sponsored by him or that the subject of the bill was an issue at trial. Finally, they do not dispute that the trial judge was Co-Chairman of the Rules Committee in the Alabama State Senate which withheld the confirmation of a nominee for the Chairmanship of the Board of Trustees of Alabama State University whose confirmation would have resulted in a majority white Board of Trustees. These are the facts upon which the Court of Appeals' decision was based.

CONCLUSION

In their Petition and Reply, Petitioners have mischaracterized not only the record in this case but also the decision of the Court of Appeals on this issue. Writ of certiorari should not issue.

Respectfully submitted

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